

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

77-6145

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BERTHA LEMLE,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

JOINT APPENDIX

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(6700)

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

74 CIV. 77

D. C. Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

BERTHA LEMLE

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

For plaintiff:

Blum Haimoff Gersen Lipson & Szabad
270 Madison Avenue
New York, N.Y. 10016
683-6383

For defendant:

US Atty.

g/1

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	D
J.S. 5 mailed X	Clerk	4/3/74	Blum, H.	15	
J.S. 6 mailed ✓	Marshal	4/4/74	H. ST		
Basis of Action: Income Tax	Docket fee				
\$23,991.59	Witness fees				
Action arose at:	Depositions				

UNITED STATES OF AMERICA

JUDGE CONNER

74 CIV 718

DATE	PROCEEDINGS	Date of Judgment
Jan. 3-74	Filed Complaint and issued summons	
Jan. 3-74	Filed summons with Marshall's return. Served on: US Atty. Office by P. Troia on 1/8/74 Atty. General Office by certified mail #594991, Wash., DC on 1/8/74	
Mar. 14-74	Filed stip. and order that the time of deft. to answer complaint is ext. to April 9, 1974. So ordered, Weinfeld, J.	
Apr. 10-74	Filed stip. and order that the time of deft. to answer complaint is ext. to April 16, 1974. So ordered, Weinfeld, J.	
Apr. 17-74	Filed stip. and order that defts. time to answer complaint is ext. to May 17, 1974. So ordered, Weinfeld, J.	
May 20-74	Filed defts. ANSWER to complaint.	
June 10-74	Case re-assigned to CONNER, J.	
Aug. 21-74	Filed plttf's affdvt. of Joseph G. Blum and notice of motion for an order, Rule 56, FRCP, granting plttf. summary judgment. Ret. 9-6-74.	
Aug. 21-74	Filed plttf's memorandum in support of motion for summary judgment.	
Sep. 24-74	Filed order- that the time of deft. to answer plttf's motion for summary judgment is extended to 10-18-74. CONNER, J. (m/n)	
Nov. 13-74	Filed deft's affdvt. of Edward R. Levitus and notice of motion for an order granting summary judgment in favor of deft. Ret. 11-28-74	
Nov. 13-74	Filed memorandum in support of deft's motion for summary judgment and in opposition to plttf's motion for summary judgment.	
Dec. 10-74	Filed stip & order that the return date of deft's cross-motion for summary judgment is extended from 11-28-74 to 12-20-74. So ordered- CONNER, J.	
Dec. 19-74	Filed reply affdvt. of Joseph G. Blum in reply to affdvt. of E.R. Levitus.	
Dec. 19-74	Filed reply memorandum in support of plttf's motion for summary judgment.	
Jan. 13-75	Filed deft's reply affdvt. of Edward R. Levitus	
Jan. 13-75	Filed deft's reply memorandum in support of its motion for summary judgment and in opposition to plttf's motion.	
Mar. 31-75	Filed "Memorandum-Opinion # 42123 and Order- for the reasons stated- the motions for summary judgment are denied pending clarification of the circumstances surrounding the execution of the compromise agreement. So ordered- CONNER, J. (m/n)	
Apr. 16-75	Pre-trial conference held by CONNER, J.	
09-19-75	Pre-trial conference held by CONNER, J.	
02-05-76	Filed Memorandum- Decision and Order- Opinion # 43839-- for the reasons stated, the Government will have (20) days from the date of this order to submit a memorandum of law fleshing out the legal theory skeletonized in Mr. Ballaine's affdvt. with whatever citations of supporting authority it deems instructive. Plttf. will have (15) days thereafter to respond. So ordered- CONNER, J. (m/n)	
03-04-76	Filed deft's memorandum filed pursuant to Court memorandum and order dated 02-03-75 in opposition to plttf's proposed judgment.	
04-15-76	Filed memorandum in support of plttf's application for entry of judgment.	
09-02-76	Filed MEMORANDUM and ORDER-opinion No. 45038 for the reasons stated, motion for summary judgment must again be denied. So Ordered. CONNER, J.	
09-24-76	PRE-TRIAL CONFERENCE HELD BY Conner J.	
12-15-76	Filed plttf's memorandum	
01-24-77	Filed deft's Memorandum of Law opposing plttf's Request for Judgment Notwithstanding the Court's 9-2-76 memorandum and order.	
02-15-77	Plttf's Reply Memorandum	

CONTINUED ON PAGE NO. 3.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF BERTHA LEMLE		DEFENDANT UNITED STATES OF AMERICA	74 CIV 77 DOCKET NO. _____ PAGE <u>3</u> OF _____ PAGES
DATE	NR.	PROCEEDINGS	CONNER, J

06-28-77		Filed Memorandum and Order - re: refund of federal income taxes ,brought pursuant to 26 U.S.C. §7422, & commenced on 1-3-74. and for the reasons stated - - as the above discussion indicates, this Court's earlier ruling is unshaken by the force of plttf's latest contentions etc. Accordingly, in the absence of an evidentiary undertaking by plttf, this Court is obliged to direct that judgment be entered dismissing the complaint upon which this action rests. So Ordered. CONNER, J m-n
06-29-77	✓	Filed Judgment - that accordingly, in the absence of an evidentiary undertaking by plttf, this Court is obliged to direct that judgment be entered dismissing the complaint upon which this action rests., complaint is dismissed in its entirety. CLERK ent. 6-29-77.
09-01-77		Filed notice of appeal of plttf to the USCA from the final judgment of J. Conner dated 6-29-77. m/n

A TRUE COPY
RAYMOND E. BURGHARDT, Clerk

By *B. J. [Signature]*
Deputy Clerk

A-4
COMPLAINT

JUDGE WEINFELD

CLERK 78-15

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x
BERTHA LEMLE,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----x

Civil Action
No.

FILED
U.S. DISTRICT COURT
JAN 3 4 04 PM '74
SOUTHERN DISTRICT

COMPLAINT

1. Plaintiff, Bertha Lemle, is a citizen of the United States and resides in New York, New York. Plaintiff's address for the purpose of this action is c/o Blum, Haimoff, Gersen, Lipson & Szabad, 270 Madison Avenue, New York, N.Y. 10016.

2. Defendant is the United States of America.

3. This is an action arising under the internal revenue laws of the United States for the refund of income taxes erroneously and illegally assessed against and collected from plaintiff.

4. Jurisdiction is conferred upon this court by 28 USC §1346(a)(i).

5. On or about September 15, 1966, plaintiff filed her individual Federal income tax return for the calendar year 1965 with the District Director of Internal Revenue for New York, New York, at 120 Church Street, New York, N.Y. 10007. The said

income tax return showed that no tax was due.

6. On or about April 15, 1967, plaintiff filed her individual Federal income tax return for the calendar year 1966 with the District Director of Internal Revenue for New York, New York, at 120 Church Street, New York, N.Y. 10007. The said income tax return showed that no tax was due.

7. On or about April 15, 1968, plaintiff filed her individual Federal income tax return for the calendar year 1967 with the District Director of Internal Revenue for New York, New York, at 120 Church Street, New York, N.Y. 10007 and paid the sum of \$471 in income taxes reported as due on said return.

8. On or about February 26, 1969, the Internal Revenue Service assessed against plaintiff deficiencies of \$6,267.71, \$8,097.54 and \$6,705.69, in additional taxes for the years 1965, 1966 and 1967 respectively.

9. On or about August 1, 1969, plaintiff paid to the Internal Revenue Service the sum of \$21,070.94, which was the full amount of the deficiency assessment against her for the calendar years 1965, 1966 and 1967.

10. On or about August 14, 1969, plaintiff paid to the Internal Revenue Service the sum of \$2,923.65 representing interest on the deficiency assessed against her for the calendar years 1965, 1966 and 1967 in the amounts of \$1,253.54, \$1,133.66 and \$536.45 respectively.

11. The assessment and collection of the deficiencies plus interest for the calendar years 1965, 1966 and 1967 was erroneous and illegal.

12. On or about August 14 1969, plaintiff filed with the District Director of Internal Revenue serving the Manhattan district, claims for refund of the deficiencies paid by her with respect to the calendar years 1965, 1966 and 1967. True copies of said claims for refund are annexed hereto.

13. More than six months have elapsed since plaintiff's claim was filed with the Internal Revenue Service and no action has been taken thereon.

14. The Internal Revenue Service has never communicated to plaintiff a notice of disallowance of her claims for refund with regard to the calendar years 1965, 1966 and 1967, except that on December 4, 1973, the Internal Revenue Service notified plaintiff that it proposed to disallow her claim for refund on form L-192A.

15. As grounds for recovery, plaintiff incorporates herein by reference the averments contained in her claim for refund for the calendar years 1965, 1966 and 1967 which are annexed to this complaint.

16. As additional grounds for recovery, plaintiff further alleges that the taxes in question were assessed against distributions to her from the Estate of Julius Lemle, deceased. Subsequent to the filing of the claims for refund annexed hereto:

(a) The Surrogate's Court, New York County, by a decree dated April 7, 1971, determined that the said distributions to plaintiff were principal distributions rather than income distributions.

(b) The Estate of Julius Lemle, deceased, which made the said distributions to plaintiff, received a refund in the estate taxes from the Internal Revenue Service on the grounds that the said distributions to plaintiff were principal distributions, rather than income distributions and, therefore, entitled the said estate to a marital deduction; and

(c) The treatment of the said amounts distributed to plaintiff by the Estate of Julius Lemle, deceased, as a distribution of principal rather than a distribution of income was reviewed and approved by the Joint Congressiona' Committee on Internal Revenue Taxation in connection with the refund in estate taxes to the Estate of Julius Lemle, deceased.

17. Plaintiff has overpaid her Federal income taxes for the calendar years 1965, 1966 and 1967 and is entitled to recover from defendant the sum of \$21,070.94 on account of such taxes and the sum of \$2,923.65 on account of interest paid for a total of \$23,994.59, together with interest thereon from the date of payment, no part of which has been repaid to plaintiff.

18. Plaintiff is the sole owner of her claim against defendant and has made no assignment of said claim.

WHEREFORE, plaintiff prays for judgment against defendant for the total amount of \$23,994.59, together with her costs and interest as provided by law.


JOSEPH G. BLUM
Attorneys for Plaintiff
BLUM HAIMOFF GERSEN LIPSON & SZABAD
270 Madison Avenue
New York, N.Y. 10016

EXHIBIT TO COMPLAINT - CLAIMS FOR
REFUND FOR YEARS 1965, 1966, 1967

FORM 843 (Rev. July 1965)	U.S. DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE CLAIM TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID	District Director's Stamp (Date Received)
The District Director will indicate in the block below the kind of claim filed, and fill in, where required.		
☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected. ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess. ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).		
PLEASE TYPE OR PRINT PLAINLY		
Name of taxpayer or purchaser of stamps <u>40 BLUM, HAIMOFF, GREEN, LIPSON & SZABAD</u> <u>BERTHA LEMLE</u>		
City, town, State, Postal ZIP Code <u>NYC 10016</u>		District Director's Stamp (Date Received)
Fill in applicable items—Attach letter size sheets if space is not sufficient		
a. Your social security number <u>052 40 3108</u>		b. If an employer, enter employer identification number
c. District in which return (if any) was filed <u>NYC</u>		d. Name and address shown on return, if different from above <u>9 EAST 40 ST NYC</u>
e. Period—if for tax reported on annual basis, prepare separate form for each taxable year From <u>1-1</u> , 1965, To <u>12-31</u> 1965		f. Kind of tax <u>INCOME</u>
g. Amount of assessment <u>\$ 6267.71</u>		Dates of payment <u>AUGUST 1969</u>
h. Date stamps were purchased from Government		i. Amount to be refunded (If it come tax, complete computation below) <u>\$ 6267.71</u>
		j. Amount to be abated (not applicable to income, estate, or gift taxes) <u>\$</u>

k. The claimant believes that this claim should be allowed for the following reasons:

PAYMENT OF THE ABOVE ASSESSMENT IS BEING MADE UNDER PROTEST.
 I ~~DO NOT~~ BELIEVE THE ^{TRUST} INCOME TAXED TO ME ON YOUR AUDIT IS TAXABLE IN WHOLE OR IN PART TO OTHERS. THE QUESTION OF THE INCOME BENEFICIARIES OF THIS TRUST IS IN LITIGATION NOW. BY VIRTUE OF MY HAVING FILED A RIGHT OF ELECTION AS SURVIVING SPOUSE, I BELIEVE THE DISTRIBUTIONS MADE TO ME ARE PAYABLE ON ACCOUNT OF MY SHARE OF CORPUS, AND THEREFORE ARE NOT TAXABLE TO ME.

COMPUTATION OF INCOME TAX REFUND	Income Tax
1. Tax withheld.....	—
2. Estimated tax paid.....	—
3. Tax paid with original return.....	—
4. Any additional income tax paid.....	6267.71
5. Total tax paid (Add lines 1-4).....	6267.71
6. Less: Your computation of correct tax.....	—0—
7. Amount of overpayment.....	6267.71
8. Amount previously refunded.....	—
9. Net overpayment (Enter in item i above).....	6267.71

Under penalties of perjury, I declare that this claim, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief it is true and correct.

Signed

Dated, 19.....

SEE INSTRUCTIONS ON REVERSE

FORM 843 (Rev. July 1965)	U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE CLAIM TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID	District Director's Stamp (Date Received)
The District Director will indicate in the block below the kind of claim filed, and fill in, where required.		
☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected. ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess. ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).		
PLEASE TYPE OR PRINT PLAINLY		
Name of taxpayer or purchaser of stamps <u>40 BLUM, NAIMOFF, GREEN</u> <u>BERTHA LEWIS</u> <u>LIPSON & SZARAD</u>		
Number and street <u>270 MADISON AVENUE</u>		City, town, State, Postal ZIP Code <u>NYC 10016</u>
Fill in applicable items—Attach letter size sheets if space is not sufficient		
c. Your social security number <u>052 40 3108</u>		b. If an employer, enter employer identification number
d. District in which return (if any) was filed <u>NYC</u>		e. Name and address shown on return, if different from above <u>9 EAST 40 ST NYC</u>
f. Period—if for tax reported on annual basis, prepare separate form for each taxable year From <u>1-1-1966</u> To <u>12-31-1966</u>		g. Kind of tax <u>INCOME</u>
h. Amount of assessment <u>\$ 8097.54</u>		i. Dates of payment <u>AUGUST 1969</u>
j. Date stamps were purchased from Government		k. Amount to be refunded (If income tax, complete computation below) <u>\$ 8097.54</u>
l. Amount to be abated (not applicable to income, estate, or gift taxes)		m.

k. The claimant believes that this claim should be allowed for the following reasons: Payment of the above assessment is being made under protest. I believe the trust income taxed to me on your audit is taxable in whole or in part to others. The question of the income beneficiaries of this trust is in litigation now. By virtue of my having filed a right of election as surviving spouse, I believe the distributions made to me are payable on account of my share of corpus, and therefore are not taxable to me.

COMPUTATION OF INCOME TAX REFUND	Income Tax
1. Tax withheld.....	-
2. Estimated tax paid.....	-
3. Tax paid with original return.....	-
4. Any additional income tax paid.....	8097.54
5. Total tax paid (Add lines 1-4).....	8097.54
6. Less: Your computation of correct tax.....	0
7. Amount of overpayment.....	8097.54
8. Amount previously refunded.....	-
9. Net overpayment (Enter in item 1 above).....	8097.54

Under penalties of perjury, I declare that this claim, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief it is true and correct.

Signed.....

Dated....., 19.....

SEE INSTRUCTIONS ON REVERSE

FORM 843
(Rev. July 1955)U.S. DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE**CLAIM**TO BE FILED WITH THE DISTRICT DIRECTOR WHERE
ASSESSMENT WAS MADE OR TAX PAIDDistrict Director's Stamp
(Date Received)

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps

40 BLUM, HAITOFF GUSEN
LIPSON & SZABAD

Number and street

270 MADISON AVENUE

City, town, State, Postal ZIP Code

NYC 10016

Fill in applicable items—Attach letter size sheets if space is not sufficient

a. Your social security number

Wife's number, if joint return

b. If an employer, enter employer identification number

05240 3108

c. District in which return (if any) was filed

d. Name and address shown on return, if different from above

NYC

9 E. 40 ST

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year

f. Kind of tax

From 1-1-1967 To 12-31-1967

INCOME

g. Amount of assessment

h. Date stamps were purchased from Government

i. Amount to be refunded (if income tax, complete computation below)

j. Amount to be abated (not applicable to income, estate, or gift taxes)

\$ 6705.69

AUGUST 1969

\$ 6705.69

\$

k. The claimant believes that this claim should be allowed for the following reasons: Payment of the above assessment is being made under protest. I believe that the trust income taxed to me on your audit is taxable in whole or in part to others. The question of the income beneficiaries of this trust is in litigation now. By virtue of my having filed a right of election as surviving spouse, I believe the distributions made to me are payable on account of my share of corpus, and therefore are not taxable to me.

COMPUTATION OF INCOME TAX REFUND

Income Tax

1. Tax withheld.....	
2. Estimated tax paid.....	
3. Tax paid with original return.....	471.00
4. Any additional income tax paid.....	6705.69
5. Total tax paid (Add lines 1-4).....	7176.69
6. Less: Your computation of correct tax.....	471.00
7. Amount of overpayment.....	6705.69
8. Amount previously refunded.....	-
9. Net overpayment (Enter in item i above).....	6705.69

Under penalties of perjury, I declare that this claim, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief it is true and correct.

Signed

Dated, 19.....

SEE INSTRUCTIONS ON REVERSE

SUMMONS

SUMMONS IN A CIVIL ACTION

(Formerly D. C. Form No. 45a Rev. (6-49))

United States District Court

JUDGE WEINFELD

FOR THE

SOUTHERN DISTRICT OF NEW YORK

84 CIV. 77

CIVIL ACTION FILE NO. _____

BERTHA LEMLE,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon Blum, Haimoff, Gersten,
Lipson & Szabad, Esqs.,

plaintiff's attorney , whose address 270 Madison Avenue, New York, N.Y. 10016

an answer to the complaint which is herewith served upon you, within 40 days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

RAYMOND E. BURGHARDT,

Clerk of Court.

Deputy Clerk.

Date: January 3, 1974.

[Seal of Court]

U.S. MARSHALS SERVICE

INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF BERTHA LEMLE	COURT NUMBER 74 Civil 77
DEFENDANT United States of America	TYPE OF WRIT 5 & C
SERVE NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN 74 11 (11/11/74)	
ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code) 74 11 (11/11/74)	
AT	

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Blum Haimoff Gerson Lipson & Szabad
270 Madison Ave., 10016 NY,
ATTY EDWARD N REINER, Esq.

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 8, etc.

NO. **1** OF **1** TOTAL

CHECK IF APPLICABLE:

☒ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR

EDWARD N REINER, Esq.

TELEPHONE NUMBER

212 693 6383

DATE

1/3/74

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted.	DEPOSIT/CODE 50	DIST. OF ORIGIN 50	DISTRICT TO SERVE 50	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK [Signature]			DATE 1/3/74

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above)

WAS. SAULUS TROIK (CLERK S.D.N.Y.)

ADDRESS (Complete only if different than shown above)

☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

FEE (If applicable)

\$3-

MILEAGE

\$0.72

DATE(S) OF ENDEAVOR (Use Remarks if necessary)

DATE OF SERVICE TIME
1/8/74 12:25 PM

SIGNATURE OF U. S. MARSHAL OR DEPUTY

[Signature]

REMARKS

Hand by mailing a copy to the Attorney General Wash D.C. certified receipt NO. 594991

DS1

USM-285 (Ed. 7-1-70)

USM-285

1. CLERK OF THE COURT **ATTY GEN. 594991**

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

SENT TO ATTORNEY GENERAL	POSTMARK OR DATE 1/8/74 12:25 PM
STREET AND NO. DEPARTMENT OF JUSTICE	
P.O. WASHINGTON, D.C. 20530	
OPTIONAL SERVICES FOR ADDITIONAL FEES	
RETURN RECEIPT SERVICES	1. Shows to whom and date delivered With delivery to addressee only
	2. Shows to whom, date and where delivered With delivery to addressee only
DELIVER TO ADDRESSEE ONLY	
SPECIAL DELIVERY (2 pounds or less)	

No. 594991

POD Form 3800
July 1969

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(See other side)

GPO 1969 O-250-312

WGB:cb
74-0057

A-13
ANSWER

FILED
U.S. DISTRICT COURT

MAY 20 10 10 AM '74

S.D. OF N.Y.

ANSWER

74 Civ. 77 (EW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BERTHA LEMLE,

Plaintiff,

- v -

UNITED STATES OF AMERICA,

Defendant.
-----x

Defendant, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for its answer to the complaint:

FIRST: Admits paragraphs 1, 2, 6 through 8 and 14 of the complaint.

SECOND: Denies paragraph 3 of the complaint except admits that this action arises under the Internal Revenue laws of the United States for the refund of income taxes assessed against and collected from plaintiff.

THIRD: With respect to paragraph 4 of the complaint, admits that jurisdiction is conferred upon this Court by 28 U.S.C. §1346(a)(1).

FOURTH: Denies knowledge or information sufficient to form a belief as to the truth of paragraph 5 of the complaint except admits that plaintiff has filed her individual Federal income tax return for the taxable year 1965 and that such return showed that no tax was due.

FIFTH: Denies paragraphs 9 and 10 of the complaint except admits that on or about August 14, 1969 plaintiff paid to the Internal Revenue Service ("IRS") the sum of \$6,267.71 plus interest of \$1,253.54 covering the deficiency assessed for taxable year 1965, the sum of

\$8,097.54 plus interest of \$1,133.66 covering the deficiency assessed for taxable year 1966 and the sum of \$6,705.69 plus interest of \$536.45 covering the deficiency assessed for taxable year 1967.

SIXTH: Denies paragraphs 11, 16 (first sentence) and 17 of the complaint.

SEVENTH: Admits paragraph 12 of the complaint except denies the averments contained in the claims for refund for the taxable years 1965, 1966 and 1967 annexed to plaintiff's complaint.

EIGHTH: Denies paragraph 13 of the complaint except admits that more than six months have elapsed since plaintiff's claims for refund for the taxable years 1965, 1966 and 1967 were filed with the IRS.

NINTH: Denies paragraph 15 of the complaint except admits that plaintiff purports to incorporate as grounds for recovery the averments contained in the claims for refund for the taxable years 1965, 1966 and 1967 annexed to the complaint.

TENTH: Denies knowledge or information sufficient to form a belief as to the truth of paragraph 16 (a) of the complaint except admits, upon information and belief, that a decree dated April 7, 1971 was entered in the Surrogate's Court of New York County (the "Decree") approving a compromise of proceedings among plaintiff, the executors of the Estate of Julius Lemle, (the "Estate"), adults interested in the Estate and a guardian ad litem representing infants entitled to remainder estates, proceedings to which neither the IRS nor any agent thereof was a party.

WGB:cb
74-0057

ELEVENTH: Denies paragraph 16(b) of the complaint except admits that subsequent to the Decree, the IRS allowed a marital deduction by the Estate under 26 U.S.C. § 2056 in the total amount of \$453,712.35, which was the amount to be paid plaintiff in full satisfaction of her right of election against the Estate under the compromise of proceedings described in paragraph TENTH hereof.

TWELFTH: Denies knowledge or information sufficient to form a belief as to the truth of paragraph 16 (c) of the complaint except admits, on information and belief, that in a letter to the Chairman of the Joint Committee on Internal Revenue Taxation, the Commissioner of the IRS set forth approval of the marital deduction by the Estate in the total amount of \$453,712.35.

WHEREFORE, defendant demands judgment dismissing the complaint, together with costs and disbursements, and such other and further relief as the Court deems just and proper.

Dated: New York, New York

May 17, 1974

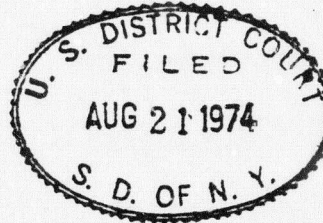
PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: _____

WILLIAM G. BALLAINE
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Room 351
Foley Square
New York, New York 10007
Telephone (212) 264-6397

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY
JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
BERTHA LEMLE,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----X

:
:
: 74 CIV. 77 (W.C.C.)
: Docket Number

: NOTICE OF MOTION
:
:

S I R :

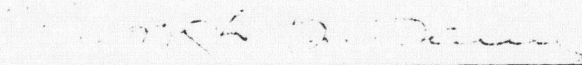
PLEASE TAKE NOTICE, that upon the annexed affidavit of JOSEPH G. BLUM, ESQ., sworn to the 19th day of August, 1974, and the exhibits attached thereto, and upon the Summons and Complaint in this action, plaintiff will move this Court before the Honorable W. C. Connors, United States District Judge, United States Courthouse, Foley Square, New York, New York, on the 6th day of September, 1974, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting the plaintiff Summary Judgment on the issues of both liability and damages, upon the ground that there is no genuine issue of fact requiring a trial herein, and for such other and further relief as may be deemed proper under the circumstances.

No prior request for the relief demanded herein
has been made.

DATED: New York, New York
August 19th, 1974.

BLUM HAIMOFF GERSEN LIPSON & SZABAD
Attorneys for Plaintiff

By


JOSEPH G. BLUM, a Member of the Firm

Office & P. O. Address
270 Madison Avenue
New York, New York 10016

To: Paul J. Curran, Esq.
United States Attorney
for the Southern District of N.Y.
Attorney for Defendant
United States Courthouse
Foley Square, New York, N. Y.

AFFIDAVIT OF JOSEPH G. BLUM, ESQ., FOR
 PLAINTIFF IN SUPPORT OF MOTION FOR SUMMARY
 JUDGMENT

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----x
 :
 BERTHA LEMLE, :
 :
 : 74 CIV. 77 (W.C.C.)
 : Docket Number
 :
 Plaintiff, :
 :
 :
 :
 -against- :
 :
 :
 :
 UNITED STATES OF AMERICA, :
 :
 :
 :
 Defendant. :
 :
 :
 :
 -----x

74 CIV. 77 (W.C.C.)
 Docket Number

AFFIDAVIT IN SUPPORT OF
 PLAINTIFF'S MOTION FOR
 SUMMARY JUDGMENT

STATE OF NEW YORK)
 :
 COUNTY OF NEW YORK) ss.:

JOSEPH G. BLUM, being sworn, says:

1. I am a member of the firm of Blum, Haimoff, Gersen, Lipson & Szabad, attorneys for plaintiff. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of plaintiff's motion for summary judgment.

2. This is an action for refund of Federal income taxes wrongfully collected from plaintiff out of principal distributions to her from her husband's estate. The facts (which will be fully documented below) are as follows:
 After the death of her husband, plaintiff filed an election under New York law to take an intestate share of his estate in lieu of taking under his will; her right to elect was contested by his estate; and, after lengthy proceedings in the Surrogate's Court, New York County, the right of election proceeding was settled by a compromise reflected in a decree of the said Court. The Court decree provided that plaintiff receive, in full satisfaction of her contested right of election, the sum of \$453,712.35, payable entirely out of the principal of the said estate. This controversy relates to the proper tax

treatment of principal payments to plaintiff in settlement of her right of election.

During 1965, 1966 and 1967, while plaintiff's right of election proceeding was pending in the Surrogate's Court, the estate made certain distributions to plaintiff. Plaintiff's returns for the years 1965, 1966, 1967 were audited by the IRS and deficiencies were assessed against her for the amounts distributed to her from the estate, the IRS contending that said amounts were income distributions. After the Surrogate's Court, New York County determined that all payments to plaintiff from the estate of Julius Lemle, Deceased, were distributions of principal, in satisfaction of her right to elect to take on intestate share against the will of her husband, plaintiff commenced the present proceeding for refund of income taxes paid on the said principal distributions to her.

3. The Court approved settlement of plaintiff's right of election proceeding explicitly provided that all distributions to plaintiff from the estate of plaintiff's husband, including those involved in this action, were principal distributions, and plaintiff was not subject to income taxes thereon. To emphasize this point the settlement agreement further provided that the beneficiaries of the estate other than plaintiff would be chargeable with taxes on the entire income of the estate, and that those remaining beneficiaries would, as a result of the settlement, file

amended personal income tax returns and pay taxes on the total income of the estate. Further indicative of the fact that distributions to plaintiff were principal distributions, the compromise agreement approved by the Court recognized that the estate would be entitled to an increased marital deduction in Federal estate taxes in an amount equal to the distributions from the estate to plaintiff, because such distributions were principal distributions. Moreover, as defendant admits in its answer, after settlement of plaintiff's right of election proceeding in the Surrogate's Court, the IRS approved a refund in estate taxes as a result of allowing the estate a marital deduction for the full amount of the estate's distributions to plaintiff. The IRS by allowing the estate this refund has recognized that the distributions to plaintiff which are the subject of this action were out of the principal of the estate and not subject to income taxes.

4. All of the material facts necessary to establish plaintiff's right to recovery appear on the face of the following subjoined documents:

(i) Letter of Joseph G. Blum, dated December 7, 1965 (Exhibit A).

(ii) Letter of Joseph G. Blum, dated August 13, 1966 (Exhibit B).

- (iii) Plaintiff's complaint (Exhibit C).
- (iv) Defendant's answer (Exhibit D).
- (v) Copy of Internal Revenue Service Agent Report for year ended 12/31/65 (Exhibit E).
- (vi) Copy of Internal Revenue Service Agent Report for the years ended 12/31/66 and 12/31/67 (Exhibit F).
- (vii) Certified copy of Decree of Surrogate's Court, New York County, dated April 7, 1971 (Exhibit G).
- (viii) Copy of Petition to Surrogate's Court for compromise of proceeding (Exhibit H).
- (ix) Copy of agreement of compromise of controversy dated August 12, 1970 (Exhibit I).

5. In the annexed exhibits, the following facts are shown:

(i) Plaintiff is the widow of Julius Lemle, Deceased, who died on December 8, 1964. Under his will and a codicil thereto, said Julius Lemle made provisions for plaintiff which were less than the elective share provided for by New York Law, and accordingly, plaintiff duly exercised her right of election in accordance with Section 18-d of the Decedent Estate Law of the State of New York. The executors of the will of said Julius Lemle contested plaintiff's right to elect to take against the will and a protracted litigation in the Surrogate's Court, New York County resulted. (Exhibit I, Pages 1-4).

(ii) The said proceeding in the Surrogate's Court, New York County, to determine the validity of plaintiff's right of election was finally settled by an agreement of compromise of controversy dated August 12, 1970 (Exhibit I) which was

entered into subject to court approval. That agreement was approved by the Court by a decree dated April 7, 1971 (Exhibit G). Under the terms of the settlement plaintiff agreed to take, in full satisfaction of her right to elect against the will of Julius Lemle, the sum of \$453,712.25, payable in full out of the principal of the estate (Exhibit I, Pages 7-8; Exhibit G, Page 4).

(iii) Since the will of Julius Lemle provided that plaintiff was to receive the income of a trust for her benefit (Exhibit I, Page 2), during the pendency of plaintiff's proceeding in the Surrogate's Court, New York County, to elect to take a principal share in her husband's estate, the estate made certain distributions to plaintiff. The estate claimed that whether these distributions were properly income or principal could not be determined until final determination of plaintiff's right of election proceeding (Exhibit A) and plaintiff claimed that these distributions were principal distributions, being made on account of her elective share (Exhibit B). Accordingly, plaintiff filed Federal income tax returns for the years 1965, 1966 and 1967 in which she showed that she received no taxable income from the estate of Julius Lemle, Deceased.

(iv) Plaintiff's said income tax returns for the years 1965, 1966 and 1967 were audited by the IRS and deficiencies of \$6,267.71, \$8,097.54 and \$6,705.69 were assessed against her for the years 1965, 1966 and 1967, together with interest in the amounts of \$1,253.54, \$1,133.66 and \$536.45 for the said years, respectively (Exhibit C, Paragraphs 8 and 10; Exhibit D, Paragraphs First and Fifth). The sole basis upon which the said deficiencies and interest were assessed against plaintiff was the inclusion in her taxable income of distributions from the estate of Julius Lemle (Exhibit E, Page 1; Exhibit F, Page 1).

(v) Subsequent to the assessment and collection of the aforesaid income taxes, the Surrogate's Court, New York County determined by its Decree of April 7, 1971 that all payments to plaintiff from the estate of Julius Lemle, Deceased including specifically the payments in 1965, 1966 and 1967 referred to in subparagraph (iv) immediately preceding, were made out of the principal of the said estate (Exhibit G).

(vi) Plaintiff duly filed claims for refund of the said income taxes paid (Exhibit D, Paragraph Seventh) and duly commenced this action for their refund. The jurisdiction of this Court is admitted (Exhibit D, Paragraph Third).

(vii) The compromise proceeding in the Surrogate's Court, New York County clearly recognized that all payments to plaintiff from the estate of Julius Lemle, including the payments involved in this action, were payments out of the principal of the estate (Exhibit H, Pages 7-8), and that plaintiff was not subject to income taxes thereon. In recognition of this point, it was clearly provided that the remaining beneficiaries of the estate, rather than plaintiff, would be chargeable with taxes on the income of the estate:

"The proposed compromise of the widow's right of election, Exhibit A hereto, contemplates that all payments heretofore made to the widow, BERTHA LEMLE, will be deemed principal payments. As a result of this provision, it will be necessary that the trust, or the remaining income beneficiaries of the residuary trust, be charged with the income earned by the residuary trust since its establishment. These income beneficiaries, BLANCHE L. DREIFUS and JEANNETTE LEMLE LEVINE, as well as the trustees, will be required to file amended income tax returns for the years in question and payment of any tax due plus interest and penalties, if any, will have to be made."
(Exhibit H, Page 7)

(viii) The compromise proceeding in the Surrogate's Court, New York County, further recognized that as a result of the fact that all payments to plaintiff from the estate were principal payments, the estate would be entitled to a marital deduction as a result of such payments.

"The Federal Estate tax consequences of the proposed settlement are favorable. The estate has paid \$707,457.82 in Federal Estate Taxes. The proposed settlement will entitle the estate to a marital deduction in the full amount of the settlement, which will entitle the estate to a refund of Federal Estate Taxes in the amount of \$168,778.96, together with statutory interest thereon from the due date of said return. This saving in estate taxes further reduces the cost of the proposed settlement to the estate." (Exhibit H, Page 5)

Since an estate is only entitled to a marital deduction on principal distributions to a surviving spouse, the above quoted provision further indicates that the distributions to plaintiff, which are the subject of this action, were non-taxable principal distributions.

(ix) Defendant admits that the IRS has allowed a marital deduction to the said estate in the amount of \$453,712.25, which was the amount paid plaintiff in settlement of her right of election (Exhibit D, Paragraphs Eleventh and Twelfth). The IRS in thus conceding that the estate was entitled to a marital deduction for distributions to plaintiff, has, in effect, conceded that the said payments were out of the principal of the said estate and are not properly subject to income taxes.

6. From all of the foregoing, it appears that the IRS has assessed deficiencies in income against plaintiff for the years 1965, 1966 and 1967 based upon plaintiff's receipt of principal distributions from the estate of Julius Lemle, Deceased,

which payments are not properly subject to income taxes. Moreover, in a collateral refund proceeding brought by the estate of Julius Lemle, the IRS has conceded that the said payments to plaintiff were in fact principal payments by allowing the estate a marital deduction against estate taxes for the said payments. There is, therefore, no genuine issue as to any material fact in this action; the taxes in question were erroneously and illegally collected; and plaintiff is entitled to a summary judgment against defendant.

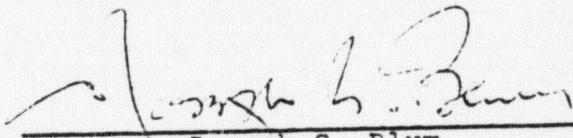
7. As attorney for plaintiff, your deponent has had numerous conversations with agents of the IRS during the course of administrative review of plaintiff's claim for refund which forms the basis of this action. Your deponent was repeatedly advised that the IRS agreed that plaintiff was entitled to a refund since she had received principal from the estate of Julius Lemle rather than income, but that, as a matter of internal policy, the IRS would make no refund until the other beneficiaries of the estate of Julius Lemle filed amended income tax returns reflecting the fact that since plaintiff had received only principal out of the estate, its other beneficiaries had received all of the estate's income. No principle of law was cited by the IRS to your deponent in support of this policy, the effect of which is to deprive plaintiff of a refund admitted to be due her, unless she could convince the other beneficiaries of the estate (who are hostile to her) to file amended tax returns. The government thus seeks to impose its own duties to collect taxes upon

plaintiff as a condition to refunding taxes admittedly due, apparently relying on administrative policy and convenience rather than principles of law.

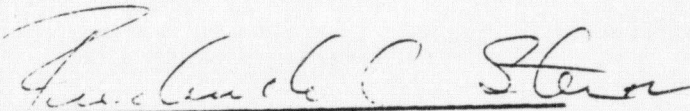
WHEREFORE, it is respectfully requested that a summary judgment be granted in favor of plaintiff against defendant for the relief demanded in the complaint, together with such other relief as the court may deem just and proper.

Sworn to before me this

9 day of August, 1974.



Joseph G. Blum.



Notary Public

FREDERICK C. STERN
Notary Public, State of New York
No. 60-9182020
Qualified in Westchester County
Commission Expires March 30, 1976

EXHIBIT A TO BLUM AFFIDAVIT - LETTER
OF JOSEPH G. BLUM, DATED 12/7/65

BY HAND

December 7, 1965.

Norman Moloshok, Esq.
Messrs. Dolson & Gordon
120 East 41st Street
New York, N. Y. 10017

Dear Norman:

Re: Estate of Julius Lemle

I have received from you your letter of November 29, 1965, in which you enclosed a number of checks for Mrs. Lemle to sign and explained the purpose of each check. I have also received for transmission to Mrs. Lemle your letter of November 26, 1965 enclosing the memorandum prepared by Stanley Gillman.

The checks have been transmitted to Mrs. Lemle for signature, as you know. I have heretofore returned to you several of these checks by hand, so that we could expedite the affairs of the estate, and I am herewith returning to you the checks made payable to Rose Levine, Blanche Dreifus and Jeannette Levine.

We are both agreed that, despite the legends affixed to the checks - particularly that on the check payable to Bertha Lemle, reciting the words "income distribution", - pending determination of a number of issues which we have been discussing, no inferences will be drawn from the issuance and the acceptance of the check as to Mrs. Lemle's rights as a surviving spouse. The payment is made to her on account of the monies she will ultimately be entitled to receive out of the estate, whether by way of principal or income.

The formula set up by Mr. Gillman, explaining how the distributions were arrived at, is not to be deemed controlling

Norman Moloshok, Esq.

12/7/65

Page #2

but only tentative, depending upon what ultimate adjustments will have to be made after a determination shall have been reached as to the rights of Mrs. Lowle.

I would appreciate your confirming this understanding.

Sincerely,

JGB:LM
cncs-cks.

Joseph G. Blum

EXHIBIT B TO BLUM AFFIDAVIT - LETTER
OF JOSEPH G. BLUM, DATED 8/13/66

August 13, 1966.

Mr. Stanley Gillman
Yohalem, Gillman & Block
420 Lexington Avenue
New York 17, N. Y.

Dear Mr. Gillman: Re: Estate of Julius Lemle

Pursuant to our conversation, I am writing to you to suggest that you proceed with the filing of Mrs. Bertha Lemle's income tax return before September 15, 1966, the date to which the filing of said return has been extended. I understand that you already are in possession of the necessary data to facilitate your preparing the tax return.

As you know, Mrs. Lemle has elected to take her intestate share of the estate of her late husband in lieu of the benefits provided for her under the will which has been admitted to probate. We have, on behalf of Mrs. Lemle, served and filed with the Surrogate's Court the notice of such election as required by law. Thus, the monies which she receives from the estate, so far as she is concerned, represent a payment to her, as the widow, of corpus. It is true, of course, that distributions have been made to her upon the assumption that she, with the other beneficiaries, are sharing in income. Nor have her co-executors conceded as of this time the validity of the election which she has made. From her point of view, however, she is entitled to consider that the monies which have been paid to her from time to time are not "income" but rather her share of the corpus of the estate.

Mrs. Lemle has made several applications for extension of her time to file her income tax return and, as you know, has pointed out that the problems connected with the distribution of

Mr. Stanley Gillman
Yohalem, Gillman & Block

8/13/66

Page #2

the estate will take time for resolution. Rather than apply for further extensions, it seems to us appropriate that her return be now filed upon the basis of the position she has taken. It will probably be appropriate to refer in a note to the fact that there is a possibility that, as a result of controversy, she may have to file an amended return which will reflect the ultimate determination which may be made.

Mrs. Lemle has authorized me to send this letter to you.

I would appreciate your reviewing the return with me when it is prepared.

Sincerely,

JGB:LM

Joseph G. Blum

EXHIBIT C TO BLUM AFFIDAVIT -
PLAINTIFF'S COMPLAINT
(Reproduced herein at pp. A-4 - A-7)

EXHIBIT D TO BLUM AFFIDAVIT -
DEFENDANT'S ANSWER
(Reproduced herein at pp. A-13 - A15)

EXHIBIT E TO BLUM AFFIDAVIT - INTERNAL
REVENUE SERVICE AGENT REPORT FOR YEAR
ENDED 12/31/65

FORM 1907 (REV. AUG. 1962) TRANSLUCENT		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE			DATE OF REPORT 12-2-68
PRELIMINARY STATEMENT					
NAME OF TAXPAYER Arthur Lemle		NAME OF LAST YEAR Edward Lemle			
SUMMARY OF PROPOSED ADJUSTMENTS					
YEAR ENDED (OR PERIOD)	INCOME TAX		OTHER TAX (Specify) DEF. OR (O/A)	PENALTIES - INCREASE OR (DECREASE)	PARTNERSHIP, FI- DUCIARY OR SMALL BUS. CORP. INCOME INCREASE OR (DECREASE)
	DEFICIENCY	INCREASE			
1965	\$ 6267.71	\$	\$	\$	\$
TOTALS	\$ 6267.71	\$	\$	\$	\$
NET DEFICIENCY (LATE)		AGREEMENT SECURED NAME OF PERSON WITH WHOM FINDINGS DISCUSSED			
\$ 6267.71		unagreed			

PRINCIPAL CAUSES OF CHANGES, AND OTHER INFORMATION

This report supplements original report dated 1/23/67.

The reason for the increase in taxable income in this report is an adjustment made to the distributable share of income received from The Trust of Julius Lemle, per examination of that entity.

SCHEDULES AND/OR EXHIBITS ATTACHED

Schedules 1-2
pages 1-4

A-35

Supplemental

FORM 886-A (REV. MAY 1959) TRANSLUCENT	U. S. TREASURY DEPARTMENT • INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE NO. OR EXHIBIT 1A
NAME OF TAXPAYER Bertha Lando		YEAR ENDED/PERIOD 1965

g Trust income - 1916.33
 As currently reported 20123.33
 As per previous report dated 1/23/67 17207.00
2016.33

Income is increased consistent with adjustment made during liquidation of the Trust V/W of Julius Lando.

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

SCHEDULE NO.

FORM 1009

(REV. AUG. 1964)

COMPUTATION OF INCOME TAX - INDIVIDUALS

NAME OF TAXPAYER(S)

YEAR ENDED/PERIOD

1. Corrected ~~gross~~ taxable income (From schedule 1)2. If tax table is applicable:
Tax on corrected adjusted gross income with exemptions

3. If tax table is NOT applicable, tax on corrected taxable income - computed for:

☒ SINGLE PERSON
 ☐ SURVIVING SPOUSE
 ☐ HEAD OF A HOUSEHOLD
 ☐ MARIED PERSONS FILING SEPARATELY
 ☐ MARIED PERSONS FILING JOINTLY
4. Alternative tax, if computed (From schedule)

5. Corrected applicable tax: Line 2, 3, or 4

6. Less:

A. Dividends received credit (From schedule)B. Retirement income credit (From schedule)C. Investment credit (From schedule)D. Other allowable credits if deductions itemized:
(From schedule)

7. Balance: Line 5 less total of amounts in line 6

8. Plus:

A. Tax from recomputing prior year investment credit
(From schedule)B. Self-employment tax on return or as corrected
(From schedule)

9. Corrected income tax liability - Line 7 plus Line 8

10. Tax shown on return or as previously adjusted

11. Statutory deficiency or (overassessment) - difference between Lines 9 and 10

COMPUTATION OF ADDITIONAL TAX DUE OR OF NET OVERASSESSMENT

	SHOWN ON YOUR RETURN		AS CORRECTED	
12. Total income tax liability		\$		\$
13. Less net adjustments:	\$		\$	
A. Income tax withheld				
B. F.I.C.A. tax credit				
C. Payments on estimated tax				
D. Required investment company undistributed capital gain credit				
E. Previous assessments				
F. Sum of amounts A through E	\$		\$	
G. Deduct previous refunds and/or credits				
14. Additional tax or (Net overassessment)		\$		\$
15. Penalties or additions to the tax, if any				\$

FORM 1009 (REV. 8-64)
Page

EXHIBIT F TO BLUM AFFIDAVIT - INTERNAL
REVENUE SERVICE AGENT REPORT FOR YEARS
ENDED 12/31/66 AND 12/31/67

FORM 1907 (REV. AUG. 1962) TRANSLUCENT		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE			DATE OF REPORT 12-7-67
PRELIMINARY STATEMENT					
NAME OF TAXPAYER Barth Lumb			NAME OF EXAMINER Edward Lumb		
SUMMARY OF PROPOSED ADJUSTMENTS					
YEAR ENDED (OR PERIOD)	INCOME TAX		OTHER TAX (SPECIAL) DEF. OR ID/AI	PENALTIES - INCREASE OR (DECREASE)	PARTNERSHIP, FI- DUCIARY OF SMALL BUS. CORP. INCOME INCREASE OR (DECREASE)
	DEFICIENCY				
1966	\$ 8097.54				
1967	6706.69				
TOTALS	\$ 14803.23				
NET DEFICIENCY (or excess)		AGREEMENT SECURED NAME OF PERSON WITH WHOM FINDINGS DISCUSSED			
\$ 14803.23		unagreed Mr S. Gillman CPA			
PRINCIPAL CAUSES OF CHANGES, AND OTHER INFORMATION					

The reason for the increase in taxable income is the inclusion of income received from the Trust w/o of Julius Lumb

No further liability exists for payroll taxes.

Maximum allowable retirement income credit has been allowed

SCHEDULES AND/OR ATTACHED.

Schedules 4
Pages 7

FORM 1040 (REV. JULY 1963)	U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE INSTRUCTIONS TO TAXPAYER	SCHEDULE
-------------------------------	---	----------

NAME OF TAXPAYER

Arthur Lemke

TAXABLE YEAR
ENDED

1966

1. Total taxable income reported on return or as previously adjusted.....

\$ 27,012.57

2. Additional income and allowable deductions

a. Interest Income \$ 23,930.71

3. TOTAL - (Line 1 and items under line 2)

\$ 27,792.28

4. Nontaxable income and additional deductions

b. Exemption \$ 1,200.00

c. Standard Deduction 1,000.00

5. Corrected taxable income
(Line 3 minus total of items under line 4)

\$ 24,592.28

GAINS OR (LOSSES)	NET GAIN OR (LOSS) UNDER SECTION 1221	NET LONG-TERM CAPITAL GAIN OR (LOSS)	NET SHORT-TERM CAPITAL GAIN OR (LOSS)
-------------------	---------------------------------------	--------------------------------------	---------------------------------------

6. Gains or (Losses) reported on return

\$

—

\$

—

\$

—

INCREASE (DECREASE)

\$

—

\$

—

\$

—

7. Gains or (Losses) as corrected

\$

—

\$

—

\$

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FORM 836-A (REV. MAY 1960) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE NO. OR EXHIBIT 1A YEAR ENDED/PERIOD 1966
NAME OF TAXPAYER Bertha Lemle		

a) Trust Income 23,930.71 ✓
 Income is increased to reflect inclusion
 of income received from the Trust U/W
 of Julius Leale

b) Operations (1700.00)
 c) Standard Deduction (1000.00)

Income is decreased to reflect statutory
 items allowed.

U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE		SCHEDULE NO.
COMPUTATION OF INCOME TAX - INDIVIDUALS		2
FORM 1041 (REV. 4-64)	NAME OF TAXPAYER(S)	YEAR ENDED/PERIOD
	<i>Barbara L. Lunde</i>	1961
1. Corrected adjusted gross or taxable income (From schedule _____)		\$ 24,594.28
2. If tax table is applicable: Tax on corrected adjusted gross income with _____ exemptions		\$
3. If tax table is NOT applicable, tax on corrected taxable income - computed for: ☒ SINGLE PERSON ☐ SURVIVING SPOUSE ☐ HEAD OF A HOUSEHOLD ☐ MARRIED PERSONS FILING SEPARATELY ☐ MARRIED PERSONS FILING JOINTLY		\$ 7326.14
4. Alternative tax, if computed (From schedule _____)		\$
5. Corrected applicable tax: Line 2, 3, or 4		\$ 8326.14
6. Less:		\$
A. Dividends received credit (From schedule _____)		
B. Retirement income credit (From schedule <i>Maxwell J. Lunde</i>)	228.60	
C. Investment credit (From schedule _____)		
D. Other allowable credits if deductions itemized: (From schedule _____)		228.60
7. Balance: Line 5 less total of amounts in line 6		\$ 8097.54
8. Plus:		\$
A. Tax from recomputing prior year investment credit (From schedule _____)		
B. Self-Employment tax on return or as corrected (From schedule _____)		
9. Corrected income tax liability - Line 7 plus Line 8		\$ 8097.54
10. Tax shown on return or as previously adjusted		- 0 -
11. Statutory deficiency or overassessment - difference between Lines 9 and 10		\$ 8097.54
COMPUTATION OF ADDITIONAL TAX DUE OR OF NET OVERASSESSMENT		
	SHOWN ON YOUR RETURN	AS CORRECTED
12. Total income tax liability	\$	\$ 8097.54
13. Less net adjustments:	\$	\$
A. Income tax withheld		
B. F.I.C.A. tax credit		
C. Payments on estimated tax		
D. Regulated investment company undistributed capital gain credit		
E. Previous assessments		
F. Sum of amounts A through E	\$	\$
G. Deduct previous refunds and/or credits		
14. Additional tax or (Refund)	\$	\$ 8097.54
15. Penalties or additions to the tax, if any		\$ None

FORM 1903 (REV. JULY 1964)	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE ADJUSTMENTS TO INCOME	SCHEDULE <u>3</u> TAXABLE YEAR ENDED <u>1967</u>	
NAME OF TAXPAYER <u>Bertha Lomala</u>			
1. For <u>Other</u> taxable income reported on return or as previously adjusted.....		\$ <u>4074.00</u>	
2. Additional income and allowable deductions			
<u>Trust Income</u>	\$ <u>19146.38</u>		
3. TOTAL - (Line 1 and items under line 2)		\$ <u>19146.38</u>	
4. Nontaxable income and additional deductions			
<u>Charitable deduction</u>	\$ <u>419.00</u>		
5. Corrected adjusted gross or taxable income (Line 3 minus total of items under line 4)		\$ <u>419.00</u>	
		\$ <u>22751.38</u>	
GAINS OR (LOSSES)	NET GAIN OR (LOSS) UNDER SECTION 1231	NET LONG-TERM CAPITAL GAIN OR (LOSS)	NET SHORT-TERM CAPITAL GAIN OR (LOSS)
6. Gains or (Losses) reported on return	\$ —	\$ —	\$ —
INCREASE (DECREASE)			
7. Gains or (Losses) as corrected	\$ —	\$ —	\$ —

FORM 286-A (REV. MAY 1963) TRANSLUCENT	U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	EXHIBIT 3A
NAME OF TAXPAYER Arthur Lunde		YEAR ENDED/PERIOD 1967

1) Trust Income

19146.38

Income is increased to reflect inclusion of income received from The Trust of Julius Lunde.

2) Federal Deduction

(419.00)

Allowed	1000.00
Claimed	581.00
Disallowed	<u>419.00</u>

Income is decreased to reflect allowance of Federal deduction to state tax maximum

U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE		SCHEDULE NO.
FORM 1040 (REV. AUG. 1974)		COMPUTATION OF INCOME TAX - INDIVIDUALS
NAME OF TAXPAYER(S) <u>Reatha L. Lumb</u>		YEAR ENDED/PERIOD <u>1967</u>
1. Corrected gross taxable income (From schedule _____)		\$ <u>22751.38</u>
2. If tax table is applicable: Tax on corrected adjusted gross income with _____ exemptions		\$
3. If tax table is NOT applicable, tax on corrected taxable income - computed for: ☒ SINGLE ☐ SURVIVING ☐ HEAD OF A ☐ MARRIED PERSONS ☐ MARRIED PERSONS ☐ JOINT ☐ SPOUSE ☐ HOUSEHOLD ☐ FILING SEPARATELY ☐ FILING JOINTLY		\$ <u>7405.69</u>
4. Alternative tax, if computed (From schedule _____)		\$
5. Corrected applicable tax: Line 2, 3, or 4		\$ <u>7405.69</u>
6. Less:		\$
A. Dividends received credit (From schedule _____)		\$
B. Retirement income credit (From schedule <u>ORIG. RETURN</u>)		\$ <u>229.00</u>
C. Investment credit (From schedule _____)		\$
D. Other allowable credits or deductions itemized: (From schedule _____)		\$ <u>229.00</u>
7. Balance: Line 5 less total of amounts in line 6		\$ <u>7176.69</u>
8. Plus:		\$
A. Tax from recomputing prior year investment credit (From schedule _____)		\$
B. Self-Employment tax on return or as corrected (From schedule _____)		\$
9. Corrected income tax liability - Line 7 plus Line 8		\$ <u>7176.69</u>
10. Tax shown on return or as previously adjusted		\$ <u>471.00</u>
11. Statutory deficiency or (overassessment) - difference between Lines 9 and 10		\$ <u>6705.69</u>
COMPUTATION OF ADDITIONAL TAX DUE OR OF NET OVERASSESSMENT		
	SHOWN ON YOUR RETURN	AS CORRECTED
12. Total income tax liability	\$ <u>471.00</u>	\$ <u>7176.69</u>
13. Less net adjustments:	\$	\$
A. Income tax withheld		
B. F.I.C.A. tax credit		
C. Payments on estimated tax		
D. Recaptured investment company undistributed capital gain credit		
E. Previous assessments	<u>471.00</u>	<u>471.00</u>
F. Sum of amounts A through E	\$ <u>471.00</u>	\$ <u>471.00</u>
G. Deduct previous refunds and/or credits	<u>471.00</u>	<u>471.00</u>
14. Additional tax or (net overassessment)	\$ <u>NONE</u>	\$ <u>6705.69</u>
15. Penalties or additions to the tax, if any		\$ <u>NONE</u>

EXHIBIT G TO BLUM AFFIDAVIT - DECREE
OF SURROGATES COURT, NEW YORK COUNTY,
DATED APRIL 7, 1971

At the Surrogate's Court, County
of New York, held at the
Courthouse in said County
on the 7 day of April 1971.

PRESENT:

HON. *Samuel R. DeLois*
Surrogate

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In the Matter of the Application of
BERTHA LEMLE for a Determination of
her Right under Section 18 of the
Decedent Estate Law to Elect to take
an Elective Share against the
Provisions of the Last Will and
Testament of

Index No.
P 7725/1964

DECREE
APPROVING
COMPROMISE OF
PROCEEDING

JULIUS LEMLE,

Deceased.

-----X

ON reading and filing the supplemental petition of
CLARENCE LEMLE, LEO LEMLE, BLANCHE L. DREIFUS and BERTHA
LEMLE, verified by CLARENCE LEMLE and LEO LEMLE on February
2, 1971, verified by BLANCHE L. DREIFUS on February 8, 1971
and verified by BERTHA LEMLE on March 2, 1971, praying for
the approval and sanction by this court of three agreements
of compromise in writing, two of which are dated August 12,
1970 and one of which is dated February 2, 1971, and all of
which are annexed to the said supplemental petition of
CLARENCE LEMLE, LEO LEMLE, BLANCHE L. DREIFUS and BERTHA
LEMLE, which three agreements of compromise have been
executed by the petitioners as the Executors of the Last

Will and Testament of Julius Lemle, deceased, and by JEANNETTE LEMLE LEVINE and J. STUART LEMLE, all of the adult persons interested in the estate of said deceased and in this proceeding who claim a portion of the said estate; and which said agreements were made and executed for the purpose of adjusting by compromise a proceeding commenced by BERTHA LEMLE by a petition duly verified on February 24, 1967, requesting a determination with respect to her right of election to take a share of the estate of Julius Lemle, deceased, pursuant to Section 18 of the Decedent Estate Law and Section 145-a of the Surrogate's Court Act; and upon the consent contained in the said supplemental petition and settlement agreements to the payment by the estate of the legal fees for services rendered in connection with this proceeding, signed and executed by all of said adult persons,

AND this court having appointed WILLIAM KESSLER, ESQ. as guardian ad litem for the following infants who are entitled to remainder estates under the will of said deceased, viz: J. STUART LEMLE; RUSSELL LEMLE; LAWRENCE CRAIG LEMLE; ROBERT SPENCER LEMLE and LAURA CAREN LEMLE; and said guardian ad litem having filed a report herein dated March 22, 1971, in which he states that he will join in said compromise agreements upon their approval by this court, and on March 24, 1971, the guardianship of the said guardian having been extended to cover unborn heirs, and the said guardian having filed a supplemental report herein dated March 29, 1971,

AND the said guardian ad litem having filed his said report herein recommending and approving said settlement

as for the best interests of said infants; and this court having inquired into the circumstances, and the said adjustment by compromise of said controversy as set forth in said agreements having been found by the court to be for the best interests of said estate, and for the best interests of said infants and the court having found the terms of said agreements to be just and reasonable in their effect upon the interest or property in said estate of said infants,

NOW, on motion of BLUM, HAIMOFF, GERSEN, LIPSON and SZABAD, ESQS., attorneys for petitioner, BERTHA LEMLE, and with the consent of all the parties to the said agreements, and in the interest of the estate and all parties as above set forth, it is

ORDERED, ADJUDGED, AND DECREED, that the three said compromise agreements, two of which are dated August 12, 1970, and one of which is dated February 2, 1971, and all of which are annexed to the supplemental petition herein, be and the same are in all respects approved, authorized and ratified, and it is further,

ORDERED, ADJUDGED AND DECREED, that the said WILLIAM KESSLER, ESQ., as guardian ad litem of said infants be and he hereby is authorized and directed in their behalf to sign, execute and deliver said three settlement agreements to said petitioners herein, and also to sign, execute and deliver any and all further instruments necessary to carry into effect said compromise agreements, and it is further,

ORDERED, ADJUDGED AND DECREED, that said petitioners, CLARENCE LEMLE, LEO LEMLE, BLANCHE L. DREIFUS, and BERTHA LEMLE, as executors of the estate of Julius Lemle, deceased, are hereby authorized to make the payments out of the principal of the estate of said deceased provided for in said compromise agreements, and it is further

ORDERED, ADJUDGED AND DECREED, that the payments required to be made to BERTHA LEMLE, pursuant to the terms of said settlement agreements in cash and in kind shall bear interest at the rate of six (6%) per centum per annum ^{to be charged to the estate} from the date of the entry of this decree to the date of payment of said amounts to said BERTHA LEMLE, and it is further,

ORDERED, ADJUDGED AND DECREED, that said CLARENCE LEMLE, LEO LEMLE, BLANCHE L. DREIFUS and BERTHA LEMLE, as executors of the estate of Julius Lemle, deceased, pay out of the principal of the said estate the following sums for legal services and disbursements rendered to the said estate in connection with this proceeding, viz:

To Messrs. Delson & Gordon, the sum of \$45,868.96;

To Messrs. Aranow, Brodsky, Bohlinger, Einhorn & Dann, the sum of \$14,490.88;

To Messrs. Perkins, Daniels and McCormack, the sum of \$8,000, and it is further,

ORDERED, ADJUDGED AND DECREED, that the compensation of said WILLIAM KESSLER, ESQ., as guardian ad litem of said infants is fixed at the sum of \$ 30,000.00 and the said

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executors of the estate of said Julius Lemle deceased, are hereby directed to pay the said sum out of the principal of the said estate, and it is further,

ORDERED, ADJUDGED AND DECREED that CLARENCE LEMLE, LEO LEMLE, BLANCHE L. DREIFUS and BERTHA LEMLE, as executors of the estate of Julius Lemle, deceased, are hereby directed to pay in full all unpaid specific legacies under the will of said Julius Lemle, deceased, without abatement and fund in full the pre-residuary trust for the benefit of ROSE LEVINE, without reduction or abatement, and it is further,

ORDERED, ADJUDGED AND DECREED, that the instant proceeding instituted by BERTHA LEMLE, for a determination of her right under Section 18 of the Decedent Estate Law to elect to take an elective share against the provisions of the Last Will and Testament of Julius Lemle, deceased, be and the same hereby is discontinued, with prejudice, and without costs.

S. Samuel H. Faleo

Surrogate
Surrogate

EXHIBIT H TO BLUM AFFIDAVIT - PETITION
TO SURROGATES COURT FOR COMPROMISE OF
PROCEEDING

SURROGATE'S COURT : COUNTY OF NEW YORK

-----X

In the Matter of the Application of
BERTHA LEMLE for a Determination of
her Right under Section 18 of the
Decedent Estate Law to Elect to take
an Elective Share against the
Provisions of the Last Will and
Testament of

Index No.
P7725/1964

SUPPLEMENTAL
PETITION FOR
COMPROMISE OF
PROCEEDING

JULIUS LEMLE,

Deceased.

-----X

TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK:

The petition of CLARENCE LEMLE, LEO LEMLE, BLANCHE
L. DREIFUS and BERTHA LEMLE respectfully shows:

1. Your petitioners in this supplemental petition
for leave to compromise the above-captioned proceeding are
the four duly qualified and acting Executors of the Last Will
and Testament of JULIUS LEMLE, deceased, duly admitted to
probate.

2. This proceeding was instituted by Bertha Lemle,
the surviving spouse of Julius Lemle, deceased, for a
determination of her right to elect against the will of
said Julius Lemle. The proceeding has been settled by
agreements among all of the adult parties in interest. This
supplemental petition is submitted pursuant to SCPA Section
2106 in that four out of five of the remainderman of the
residuary trust created by the will of said Julius Lemle,
deceased, are minors, and accordingly, court approval of
the settlement is required.

3. The claim which BERTHA LEMLE asserts against the Estate of JULIUS LEMLE, deceased, in this proceeding, is as follows:

On February 3, 1966 BERTHA LEMLE, the surviving spouse of JULIUS LEMLE, deceased, filed and recorded in the Surrogate's Court, New York County, a Notice of Election pursuant to Section 18 of the Decedent Estate Law, (presently Section 5-1.1 of the Estates, Powers and Trusts Law), electing to exercise the right of election provided for in Section 18 of the Decedent Estate Law and to take her elective share of the Estate of JULIUS LEMLE, deceased. BLANCHE L. DREIFUS, CLARENCE LEMLE and LEO LEMLE as Executors of the Estate of JULIUS LEMLE, deceased, rejected BERTHA LEMLE's claim to take her elective share by reason of a certain antenuptial agreement dated October 20, 1952 executed by your petitioner, BERTHA LEMLE, and JULIUS LEMLE, deceased. Thereafter, by a petition duly verified on February 24, 1967, BERTHA LEMLE, petitioned this Court pursuant to Section 18 of the Decedent Estate Law and Section 145-a of the Surrogate's Court Act for a determination of the validity of her election as aforesaid. Said petition was duly served upon all parties interested in the Estate of JULIUS LEMLE, deceased, including WILLIAM KESSLER, Esq., who was appointed as Special Guardian and Guardian Ad Litem of the infants, J. STUART LEMLE, RUSSELL LEMLE, LAWRENCE CRAIG LEMLE,

ROBERT SPENCER LEMLE and LAURA CAREN LEMLE. BLANCHE L. DREIFUS, CLARENCE LEMLE and LEO LEMLE, as Executors, answered said petition by an answer duly verified on May 17, 1967. BLANCHE L. DREIFUS individually and JEANNETTE LEMLE LEVINE, an income beneficiary of one of the trusts created under the will of JULIUS LEMLE, answered said petition by an answer duly verified on May 4, 1967. WILLIAM KESSLER, Esq., as special guardian and guardian ad litem of the aforementioned infants answered said petition by an answer duly verified on May 23, 1967. All of said answering parties set forth three separate defense in bar to BERTHA LEMLE's claim of a right of election, as follows: (1) an ante-nuptial agreement dated October 20, 1952 entered into between JULIUS LEMLE, deceased, and BERTHA LEMLE, barred such right of election; (2) estoppel; and (3) laches. Various and protracted proceedings have resulted. Lengthy examinations before trial have been conducted herein. BERTHA LEMLE made a motion under CPLR 3211, to dismiss the affirmative defenses of estoppel and laches raised by respondents in this proceeding, which motion was granted. Respondents appealed to the Appellate Division, First Judicial Department, which reversed the decision and reinstated said defenses. The controversy arising in this proceeding is still undetermined.

4. Agreements have been entered into by and among the executors and the other adult parties in interest to compromise this proceeding. The proposed compromise of

Bertha Lemle's right of election is in the amount of \$453,712.25. A copy of the agreement of compromise which is, by its terms, subject to the approval of this Court, is annexed hereto as Exhibit A. Inasmuch as said proposed compromise will have effect on the administration of the estate and on the income beneficiaries and the remaindermen of the trusts created under the will of Julius Lemle, supplemental agreements of settlement, which provide for payments of specific legacies and legal fees and adjust the rights of said income beneficiaries and remaindermen, have been entered into by and among the Executors of the Estate and the interested parties. The reasons for and the terms of said supplemental agreements of settlement are set forth in paragraphs 6 through 9 hereof. Copies of said supplemental agreements of settlement, which are, by their terms, subject to the approval of this Court, are annexed hereto as Exhibits B and C.

5. Upon information and belief, it is in the best interests of the infant grandchildren of the decedent as well as of the estate, that the said agreement to compromise the claim of Bertha Lemle, be authorized for the following reasons:

(a) Said agreement was entered into only after considerable negotiations between the parties. Your petitioners are mindful of the uncertainty of litigation, the possibility of further protracted future proceedings in this Court and in the Appellate Courts, the possibility of a trial, and the expense and delay which will be caused in the event a compromise is not reached.

(b) The proposed compromise of Bertha Lemle's right of election, which compromise is in the amount of \$453,712. is fair and reasonable in view of the fact that in the event Bertha Lemle prevails in this proceeding to determine the validity of her right of election she would become entitled to one-third ($1/3$) of the Estate of Julius Lemle, deceased. The total gross estate of Julius Lemle, deceased, as determined upon its Federal Estate Tax audit, was \$2,403,811.17. The total adjusted gross estate determined upon audit was \$2,246,116.64. If Bertha Lemle prevails in this proceeding, she will be entitled to one-third ($1/3$) of the said adjusted gross estate, or \$772,038.86. In addition, if Bertha Lemle prevails in this proceeding, she will be entitled to one-third of all income received by the estate, and one-third of all appreciation in the value of the assets of the estate since the death of Julius Lemle on December 8, 1964, which amount, in the aggregate, would exceed \$1,250,000.

(c) The Federal Estate tax consequences of the proposed settlement are favorable. The estate has paid \$707,457.82 in Federal Estate Taxes. The proposed settlement will entitle the estate to a marital deduction in the full amount of the settlement, which will entitle the estate to a refund of Federal Estate Taxes in the amount of \$168,778.96, together with statutory interest thereon from the due date of said return. This saving in estate taxes further reduces the cost of the proposed settlement to the estate.

(d) Your petitioners further believe that the

proposed compromise is in the best interest of the estate and all parties interested in the estate because, by the terms of said settlement, the amount to be paid to Bertha Lemle will be paid over a period of many years.

(e) William Kessler, Esq., who has heretofore been appointed as Special Guardian (now Guardian ad Litem) for the minor remaindermen of the estate, has read this petition and the proposed compromise agreements and has advised your petitioners that he has no objection and will sign them if the Court approves said agreements.

6. The Executors of the Estate of Julius Lemle, deceased, deemed it equitable and proper to make a partial distribution to the remaindermen of the residuary trust, the five grandchildren of decedent, simultaneously with the settlement of the widow's claim, and as part of the settlement proceedings. The supplemental agreement of settlement, Exhibit P hereto, was therefore entered into, providing in substance for a distribution to the five remaindermen, in equal shares, out of the principal assets of the Estate, of the total sum of \$153,450.00. The distribution is to be effected in part by the assignment of certain notes secured by mortgages held by the estate and in part by a cash distribution. The said sum of \$153,450.00 approximates the present value of the net cost to the estate (after taking into account the refund of Federal Estate Taxes and the life expectancy of the two income beneficiaries) of the amount being paid to the widow, Bertha Lemle, under the proposed settlement of this right of election proceeding.

7. The proposed compromise of the widow's right of election, Exhibit A hereto, contemplates that all payments heretofore made to the widow, BERTHA LEMLE, will be deemed principal payments. As a result of this provision, it will be necessary that the trust, or the remaining income beneficiaries of the residuary trust, be charged with the income earned by the residuary trust since its establishment. These income beneficiaries, BLANCHE L. DREIFUS and JEANNETTE LEMLE LEVINE, as well as the trustees, will be required to file amended income tax returns for the years in question and payment of any tax due plus interest and penalties, if any, will have to be made. The proposed supplemental settlement agreement, Exhibit B hereto, contemplates that the income earned during the years in question are not to be re-allocated to these income beneficiaries, but that as part of the overall settlement, all costs incurred in connection with the preparation of the amended income tax returns, as well as any additional taxes, interest and penalties, which may be payable by such income beneficiaries or the trust will be paid by the executors and trustees and charged to principal.

8. Article 22(10) of the decedent's Last Will and Testament provides:

"In cases where the discretion of my trustees is involved, a decision of the majority of the trustees then acting shall be binding upon all."

The settlement of the widow's claim provides that after consummation of the settlement, the widow, Bertha Lemle, shall account and resign as executrix and trustee. The remaining executors and trustees have agreed that upon this event occurring, the unanimous agreement of the executors and trustees shall be required in every case.

9. Simultaneously herewith, Messrs. Delson & Gordon, and Messrs. Aranow, Brodsky, Bohlinger, Einhorn & Dann, attorneys who have performed services for the estate and are entitled to be compensated out of the estate, are submitting affidavits of their services to the estate in connection with this proceeding and your petitioners request that this court approve payment of fees to said attorneys in the amount set forth in the said affidavits of services. In the supplemental agreement of settlement, Exhibit C hereto, all of the adult parties interested in the estate of Julius Lemle, deceased, have consented to the payment by the estate of the legal fees for services rendered in connection with this proceeding to Messrs. Delson & Gordon / and special trial counsel in the sum of \$45,868.96 and to Messrs. Aranow, Brodsky, Bohlinger, Einhorn & Dann, in the sum of \$14,490.88. Your petitioners request that the court approve said fees in the decree to be entered herein, compromising the claim of Bertha Lemle against the Estate of Julius Lemle, deceased, for the reason that any fees to be paid to said attorneys, as well as any fees to be paid to William Kessler, Esq., the Special Guardian herein will be deductible items for Federal Estate

Tax purposes, and, if approved in the decree to be entered herein, will be included in an increased claim for refund of estate taxes filed by the estate. It would be in the best interest of the estate and of all parties interested in the estate for the said fees to be fixed at the present time. As has been pointed out above, in the event that the Court authorizes the compromise of the claim of Bertha Lemle against the estate of Julius Lemle, deceased, the estate will be entitled to a refund in Federal estate taxes in the amount of \$168,778.96, together with interest thereon, by virtue of an increased marital deduction to the said estate. It would be advantageous to the estate to process a claim for refund including attorneys' fees, deductible as an administration expense at the same time that it processes a claim for refund based on the settlement of the claim of your petitioner, Bertha Lemle. If the said attorneys' fees are not allowed until the final accounting, the estate will lose the opportunity to take such fees as deductions for Federal estate tax purposes, to the detriment of the minor-remaindermen of the residuary trust.

10. The supplemental agreement of settlement, Exhibit C hereto, further provides for the payment in full, without abatement, of all specific legacies under the will of Julius Lemle, deceased, and for the funding in full of the pre-residuary trust for the benefit of Rose Levine. There are funds available in the estate of Julius Lemle deceased to make the aforesaid payments in full. As a result of this

provision of the settlement agreement, the legatees named as parties in interest in the original petition of Bertha Lemle, which instituted this proceeding, are in no way injured or affected by the proposed settlement, and are not necessary parties hereto. The only parties who have an interest in the outcome of this proceeding are: Bertha Lemle, the widow; the Executors of the will of Julius Lemle, deceased; and the income beneficiaries and remaindermen of the pre-residuary and the residuary trusts.

11. All of the parties in interest have consented to the proposed settlement by signing the proposed agreements of settlement, Exhibits A, B and C hereto, except William Kessler, Esq., Special Guardian and Guardian ad Litem for the minor remaindermen. As hereinabove indicated, William Kessler, Esq., has read this petition and the proposed compromise agreements and has advised your petitioners that he has no objection to the proposed compromise and will sign the said agreements if the Court approves them.

12. As hereinabove indicated, William Kessler, Esq., has appeared in this proceeding as Special Guardian for the said infant remaindermen, Russell Lemle, Lawrence Craig Lemle, Robert Spencer Lemle and Laura Caren Lemle, and for J. Stuart Lemle, who was an infant at the time of the appointment of said William Kessler, Esq., as Special Guardian, but who has now attained the age of 21 years. Accordingly, said J. Stuart Lemle has signed the agreement compromising the widow's claim.

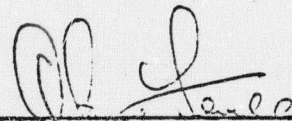
WHEREFORE, your petitioners pray that this Court:

(a) approve the proposed compromise agreements (exhibits A, B and C hereto) and authorize petitioners to adjust by compromise said contest and controversy and authorize petitioners to pay all specific legacies, without abatement and fund the pre-residuary trust without abatement, as provided in said agreements; and

(b) authorize William Kessler, Esq., as guardian ad litem for the said infant children to execute said agreements of compromise of controversy; and

(c) approve the fees of counsel as requested in Par. 9 hereof; and

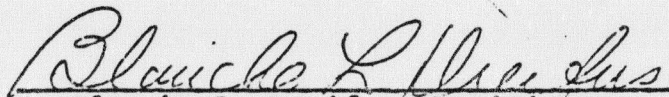
(d) grant to your petitioner such other and further relief as to this Court may seem just and proper.



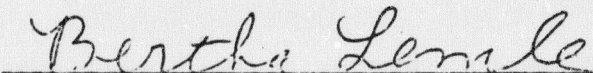
Clarence Lemle, Petitioner



Leo Lemle, Petitioner



Blanche L. Dreifus, Petitioner



Bertha Lemle, Petitioner

EXHIBIT I TO BLUM AFFIDAVIT - AGREEMENT
OF COMPROMISE OF CONTROVERSY DATED
AUGUST 12, 1970
SURROGATE'S COURT : COUNTY OF NEW YORK

-----X

In the Matter of the Application of
BERTHA LEMLE for a Determination of her
Right under Section 18 of the Decedent
Estate Law to Elect to take an Elective
Share against the Provisions of the Last
Will and Testament of

AGREEMENT OF
COMPROMISE OF
CONTROVERSY

P 7725/1964

JULIUS LEMLE,

Deceased.

-----X

AGREEMENT made this 17th day of ^{August} July, 1970,
by and among, BERTHA LEMLE, LEO LEMLE, BLANCHE L. DREIFUS
and CLARENCE LEMLE, as Executors of the Will of JULIUS
LEMLE, Deceased, BLANCHE L. DREIFUS, individually, BERTHA
LEMLE, individually, JEANNETTE LEMLE LEVINE, and WILLIAM
KESSLER, Guardian Ad Litem for the infants, J. STUART
LEMLE, RUSSEL LEMLE, LAWRENCE CRAIG LEMLE, ROBERT SPENCER
LEMLE, and LAURA CAREN LEMLE, and J. STUART LEMLE, individ-
ually.

W I T N E S S E T H:

WHEREAS, Julius Lemle, deceased, died on December
8, 1964, leaving his widow, Bertha Lemle, the Petitioner
herein him surviving; and

WHEREAS, the Last Will and Testament of Julius
Lemle, dated August 8, 1958 and the First Codicil thereto
dated June 14, 1961 were duly admitted to probate by the
Surrogate's Court, New York County, on November 23, 1965,
and Letters Testamentary thereon were duly issued to Bertha

Lemle, Blanche L. Dreifus, Leo Lemle and Clarence Lemle, the four persons named in said Will and Codicil as Executors, who have duly qualified thereunder and are still acting as such Executors; and

WHEREAS, under said Will and Codicil, Julius Lemle made provisions for his widow, Bertha Lemle, as follows:

(a) A specific bequest of \$25 000.

(b) The net income for life of one-third of decedent's residuary estate, subject, however, to a further provision fixing a sum of \$700. per month as the minimum income to be paid to Bertha Lemle; and

(c) A contingent remainder interest in a pre-residuary Trust for the benefit of Rose Levine; and

WHEREAS, the provisions made for Bertha Lemle under said Will and Codicil of Julius Lemle were less than the elective share provided for by Section 18 of the New York Decedent Estate Law and did not constitute a devise or bequest sufficient to bar Bertha Lemle's right to take her said elective share; and

WHEREAS, Bertha Lemle duly exercised her right of election in accordance with the former Section 18-d of the Decedent Estate Law (presently Section 5-1.1 of the Estates, Powers, and Trusts Law), by duly serving notice of such election and duly filing and recording the original of said election, with proof of service in the Surrogate's Court, New York County, on February 3, 1966; and

WHEREAS, the Executors of the Will of Julius Lemle, Deceased (other than Bertha Lemle) rejected Bertha Lemle's election to take a share of the estate of said decedent, as provided in Section 18 of the Decedent Estate Law by reason of an ante-nuptial agreement dated October 20, 1952 executed by Bertha Lemle and by the decedent Julius Lemle; and

WHEREAS, by reason of the rejection of Bertha Lemle's election as aforesaid, Bertha Lemle commenced the above captioned proceeding requesting a determination with respect to her right of election pursuant to Section 18 of the Decedent Estate Law, and Section 145-a of the Surrogate's Court Act by a petition duly verified on the 24th day of February 1967 and caused notice of said proceeding to be served on all parties interested in the Estate of Julius Lemle, deceased, as enumerated in Paragraphs 2, and 13 of said petition; and

WHEREAS, Blanche L. Dreifus, Clarence Lemle and Leo Lemle, as Executors under the Last Will and Testament of Julius Lemle appeared in said proceeding by Delson & Gordon, Esqs., 120 East 41st Street, New York, N. Y. and answered the said petition of Bertha Lemle by an answer duly verified on May 17, 1967; and William Kessler, Esq. of 19 West 44th Street, New York, N. Y., Guardian Ad Litem of the infants, J. Stuart Lemle, Russel Lemle, Lawrence Craig Lemle, Robert Spencer Lemle, and Laura Caren Lemle appeared in the proceeding by an answer duly verified on May 23, 1967; and

Blanche L. Dreifus and Jeannette Lemle Levine appeared in said proceeding by Perkins Daniels and McCormack of 30 Rockefeller Plaza, New York, N. Y. by an answer duly verified on May 4, 1967; and .

WHEREAS, all of the aforesaid parties who appeared by answer contested said Bertha Lemle's right of election setting forth three separate defenses:

1. An ante-nuptial agreement dated October 20, 1952 entered into between Julius Lemle and Bertha Lemle;
2. Estoppel,
3. Laches; and

WHEREAS, in addition to the aforementioned parties who appeared in this proceeding by answer, the following parties who are interested in the Estate of Julius Lemle, Deceased, appeared in this proceeding:

A. UNITED HIAS SERVICE, INC., by Finkelstein, Benton & Soll, 515 Madison Avenue, New York, N. Y.

B. JEWISH HOME AND HOSPITAL FOR AGED, by WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ, 270 Madison Avenue, New York, N. Y.

C. THE AMERICAN NATIONAL RED CROSS, by WEIL, GOTSHAL & MANGES, 60 East 42nd Street, New York, N. Y.

D. BRUCE LEMLE, by LEE FELTMAN, Esq., 22 East 40th Street, New York, N. Y., and

WHEREAS, protracted litigation has resulted with respect to Bertha Lemle's right under Section 18 of the

Decedent Estate Law to elect to take an elective share against the provisions of the Last Will and Testament of Julius Lemle, Deceased, including examinations of Bertha Lemle conducted on June 20, 1967 and June 28, 1967, and examinations of Clarence Lemle and Leo Lemle, conducted on March 5, 1968 and an examination of Blanche L. Dreifus, conducted on February 8, 1968 and including a motion pursuant to Rule 3211(b) CPLR by Bertha Lemle to dismiss the affirmative defenses of estoppel and laches pleaded in the aforementioned answers to Bertha Lemle's petition herein, which motion was granted by the Surrogate and appealed by respondents to the Appellate Division, First Judicial Department; and

WHEREAS, the Executors of the Estate of Julius Lemle, Deceased, recognize the merit of Bertha Lemle's claim that she is entitled to her right of election provided for in Section 18 of the Decedent Estate Law and to take her elective share of the estate of Julius Lemle, Deceased, inasmuch as Bertha Lemle has demonstrated to the parties in the course of this proceeding that:

(a) Bertha Lemle entered into the antenuptial agreement on October 20, 1952 without independent legal advice or assistance as to the meaning and effect of said agreement and the nature, extent and value of the rights and interests affected thereby; and

(b) Bertha Lemle did not have sufficient knowledge, training or experience to understand the meaning and effect of said ante-nuptial agreement; and

(c) The decedent, Julius Lemle, failed to disclose to Bertha Lemle his true financial worth, which was in fact ample to make provisions for Bertha Lemle's support far in excess of the provision made for her in said ante-nuptial agreement; and

(d) The decedent Julius Lemle lived in a modest style which misled Bertha Lemle as to the value of his property and financial worth, and Bertha Lemle executed said ante-nuptial agreement as a result of lack of knowledge of Julius Lemle's property and financial worth; and

WHEREAS, Berthe Lemle is of advanced years and is willing to accept less than the amount she is justifiably entitled to upon exercise of her right of election and is willing to measure her rights considering only the value of the assets of Julius Lemle as of the date of his death, provided the estate of Julius Lemle, Deceased, makes immediate payment to her so that she may enjoy the benefits of her property rights during her lifetime.

NOW THEREFORE, IT IS STIPULATED AND AGREED that,

subject to the approval of the Surrogate's Court of the County of New York:

1. The respondents in this proceeding, Blanche L. Dreifus, Clarence Lemle and Leo Lemle, as Executors under the Last Will and Testament of Julius Lemle, Deceased, William Kessler, Guardian Ad Litem of the infants, J. Stuart Lemle, Russel Lemle, Lawrence Craig Lemle, Robert Spencer Lemle, Laura Caren Lemle, and Blanche L. Dreifus individually and Jeannette Lemle Levine, agree to withdraw and hereby do withdraw all objections to the right of Bertha Lemle to elect under Section 18 of the Decedent Estate Law to take an elective share against the provisions of the Last Will and Testament of Julius Lemle, Deceased, and all of said parties hereby withdraw their answers to the petition of Bertha Lemle herein, all without costs to any party upon the following conditions.

(a) That there be paid to the said Bertha Lemle in full satisfaction of her rights under Section 18 of the Decedent Estate Law to elect to take an elective share against the provisions of the Last Will and Testament of Julius Lemle, Deceased, the sum of \$453,712.25, payable out of the principal of said estate as hereinafter provided;

(b) That in further consideration of the withdrawal of the answers of the aforementioned respondents, Bertha Lemle agrees to accept the

aforesaid sum of \$453,712.25, without interest in full settlement of any and all claims which she has or may have against the said estate as a distributee or otherwise, in full settlement of any and all claims which she may have to income of the estate, and in full settlement of any and all claims which she may have for additional commissions as Executrix and Trustee under the Will of Julius Lemle, deceased. Upon receiving the said sum, the said Bertha Lemle agrees to execute a general release discharging the estate and each of the Executors thereof from any and all claims and demands of any kind which she ever had, now has, or may hereafter have against the said estate or the Executors thereof, or for any share therein.

2. The amount of \$453,712.25 hereinabove referred to shall be paid, or has been paid by the Executors of the Will of Julius Lemle, Deceased to Bertha Lemle, as follows:

(a) \$216,974.86 has heretofore been paid to Bertha Lemle at various times between March 1965 and June 18, 1970.

(b) The sum of \$40,437.39, in cash within 60 days after the entry of an order approving this agreement by the Surrogate, provided however, that if any payments are made by the Executors of the Will of Julius Lemle, Deceased, to Bertha Lemle between the date of the execution of this agreement

and the date of payment of the said sum of \$40,437.39, the amount of such payments shall be deducted from the said cash payment of \$40,437.39 to be made pursuant to this subparagraph.

(c) The sum of \$145,800, by the Executors of the Estate of Julius Lemle, Deceased, executing and delivering to Bertha Lemle within 60 days after the entry of an order approving this agreement by the Surrogate, a note secured by a first mortgage on certain properties, which note and mortgage shall be in the form annexed hereto as Exhibits A and B respectively.

(d) The sum of \$50,500 by the Executors of the Estate of Julius Lemle, Deceased, assigning to Bertha Lemle within 60 days after the entry of an order approving this agreement by the Surrogate, an existing subordinate mortgage on 326-328 East 65th Street, which mortgage is dated March 6, 1970, a copy of which is annexed hereto as Exhibit C. In the event that at the time of assignment of said subordinate mortgage to Bertha Lemle, the principal balance due upon said mortgage has been reduced to less than \$50,500, by payments made on account of principal thereon, the Executors of the Estate of Julius Lemle, Deceased, shall pay to Bertha Lemle simultaneously with the assignment of said subordinate mortgage, an amount equal to the

difference between the then principal balance and the sum of \$50,500. Interest on the said mortgage shall be adjusted to the date of closing.

3. In further consideration of the settlement hereinabove referred to:

(a) The Executors of the Estate of Julius Lemle, Deceased, agree to pay any and all mortgage recording taxes which may be incurred by Bertha Lemle in connection with the mortgages referred to in Par. 2 hereof; and

(b) Bertha Lemle agrees that upon the approval of this agreement by the Surrogate, she will waive any unpaid commissions as Executrix and Trustee of the Estate of Julius Lemle, Deceased, by executing a waiver of said commissions in the form annexed hereto as Exhibit D; and

(c) Bertha Lemle agrees that she will petition the Surrogate for permission to resign as Executrix and Trustee under the Will of Julius Lemle, Deceased, and she will account for her acts as such Executrix and Trustee.

4. The Executors agree that they shall petition the Surrogate of the County of New York for approval of this agreement and the settlement and payments herein provided.

This agreement and all the terms hereof shall become binding upon the parties, their respective heirs, executors and administrators, upon approval by the Surrogate.

Bertha Lemle

Bertha Lemle, individually and as Executrix of the Will of Julius Lemle, Deceased.

Blanche L. Dreifus

Blanche L. Dreifus, individually and as Executrix of the Will of Julius Lemle, Deceased.

Leo Lemle

Leo Lemle, as Executors of the Will of Julius Lemle, Deceased.

Clarence Lemle

Clarence Lemle, as Executor of the Will of Julius Lemle, Deceased.

Jeannette Lemle Levine

Jeannette Lemle Levine

William Kessler

William Kessler, Guardian Ad Litem for the infants, J. Stuart Lemle, Russel Lemle, Lawrence Craig Lemle, Robert Spencer Lemle, Laura Caren Lemle

J. Stuart Lemle

J. Stuart Lemle

AGREEMENT made this 12th day of August, 1970 between BERTHA LEMLE (hereinafter "Widow") and BLANCHE DREIFUS, (hereinafter "Blanche"), individually and as Executrices and Trustees, and CLARENCE LEMLE, (hereinafter "Clarence"), LEO LEMLE, (hereinafter "Leo"), as Executors and Trustees under the Last Will and Testament of Julius Lemle, deceased, Jeannette Lemle Levine, one of the income beneficiaries, and J. Stuart Lemle, one of the remaindermen of the Trusts established under the Last Will and Testament of Julius Lemle, deceased.

W I T N E S S E T H :

WHEREAS, the Widow has heretofore filed a notice of election to take her elective share against the provisions of the Last Will and Testament and Codicil thereto of the late Julius Lemle and has filed a petition for a determination as to the validity and effect of said notice of election; and,

WHEREAS, the Executors have rejected the notice of election and served an answer to the petition joining issue as to the validity and effect of said notice of election; and,

WHEREAS, the matter has been set down for trial in the Surrogate's Court, New York County on August 19, 1970; and,

WHEREAS, the parties hereto propose to enter into an Agreement, subject to the approval of the Surrogate's Court, New York County, settling the said proceeding commenced by the Widow referred to above upon terms and conditions as set forth in said Agreement to be executed simultaneously herewith; and,

WHEREAS, pursuant to the provisions of Article "EIGHTEENTH" of the Last Will and Testament and Codicil of said decedent, the residuary estate is to be paid to the children of the decedent's sons, Clarence Lemle and Leo Lemle, in equal shares; and

WHEREAS, said remaindermen now consist of J. Stuart Lemle, Russell Lemle and Lawrence Craig Lemle, children of Clarence, and Robert Spencer Lemle and Laura Karen Lemle, children of Leo, all of whom are infants except J. Stuart Lemle; and

WHEREAS, in the event that the proposed settlement with the Widow is consummated, it is deemed expedient to make a distribution from the estate, contemporaneously with the consummation of the settlement with the Widow referred to above, to the remaindermen of the estate and trusts, of cash and property as hereinafter described; and

WHEREAS, the proposed settlement and distributions have been reviewed and discussed with William Kessler, Esq., the Guardian ad litem for the infant remaindermen in the said right of election proceeding and he has approved thereof, subject to the approval of the Surrogate; and

WHEREAS, the parties hereto desire to enter into a further Agreement as hereinafter set forth with respect to the future management of the estate and trusts and to make provision for discharging any tax liabilities which may arise as a consequence of the proposed settlement with the Widow.

NOW, UPON CONSIDERATION OF THE COVENANTS
HEREIN CONTAINED, IT IS MUTUALLY AGREED AS FOLLOWS:

1. In the event that the proposed settlement of the proceeding commenced by the Widow for the determination of her right of election is approved by the Surrogate and subsequently consummated, the Executors will distribute to the five remaindermen, in equal shares, out of the principal assets of the Estate, by making distribution to their respective general Guardians, or to them directly if such remaindermen are of majority, the total sum of ONE HUNDRED AND FIFTY-THREE THOUSAND FOUR HUNDRED AND FIFTY DOLLARS (\$153,450.00), consisting of the following:

(a) TWENTY-EIGHT THOUSAND AND FIFTY DOLLARS (\$28,050.00) by assigning a note reduced to said amount and secured by a first mortgage now a lien on premises 241 West 15th Street, New York, New York; the principal indebtedness being payable in monthly installments of FIFTY DOLLARS (\$50.00) each, together with interest at the rate of six (6%) percent per annum, payable monthly, with the balance of principal being due and payable on February 17, 1972.

(b) FIFTY-SEVEN THOUSAND SIX HUNDRED AND FIFTY-NINE DOLLARS AND THIRTY CENTS (\$57,659.30) by assigning a note reduced to said amount and secured by a first mortgage now a lien on premises 332 East 95th Street, New York, New York; the principal indebtedness being payable in monthly installments of ONE HUNDRED AND THREE DOLLARS AND THIRTY-FIVE CENTS (\$103.35) each, together with interest at the rate of six (6%) percent per annum payable monthly, with the balance of principal being due and payable on November 1, 1971.

(c) FIFTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$57,500.00) by assigning a note secured by a purchase money third mortgage upon premises 307-309 East 78th Street, New York, New York, the principal indebtedness being payable in quarter-annual installments of THREE HUNDRED AND EIGHTY DOLLARS (\$380.00) each, together with interest at the rate of six and one-half (6-1/2%) percent per annum payable quarter-annually, with the balance of principal being due and payable about July 1, 1975.

(d) TEN THOUSAND TWO HUNDRED AND FORTY DOLLARS AND SEVENTY CENTS (\$10,240.70) in cash. The amount of cash required to be paid hereunder shall be increased, if necessary, by an amount equal to any amortization to be paid under any of the mortgages herein above referred to between the date hereof and the date of consummation of this Agreement, it being the intention of the parties that the distribution made to the remaindermen will be in the aggregate amount of ONE HUNDRED AND FIFTY-THREE THOUSAND FOUR HUNDRED AND FIFTY DOLLARS (\$153,450.00).

2. The Exeuctors and Trustees agree that they will (1) pay to Blanche L. Dreifus and Jeannette Levine an amount equal to the amount of all income taxes, interest and penalties, if any, which may be due, payable by or assessed against Blanche L. Dreifus and Jeannette Levine by the United States Internal Revenue Service, the New York State Department of Taxation and Finance and the City of New York Finance Administration, on account of income taxes, by reason of the consummation of the agreement of settlement with the Widow, and (2) indemnify the said Blanche and

Jeannette and leave them harmless with respect to any such claims.

All payments made to Blanche and Jeannette or any taxing authority under this article will be charged to principal. It is further agreed that Messrs. Yohalem, Gillman and Stein, CPAs, will prepare whatever amended tax returns may be necessary for the Estate and Trust and for Blanche and Jeannette and that the cost of preparation of such returns and any audits thereof shall be paid by the Estate and charged to principal.

3. Notwithstanding anything to the contrary, including, but not limited to, the provisions of Article "TWENTY-SECOND (10)" of the Last Will and Testament and Codicil of Julius Lemle, deceased, the parties hereto agree that in every case where a decision of the Executors or Trustees is involved in connection with the management of the within estate and trusts and their respective assets and liabilities, no action may be taken, or power of the fiduciaries exercised, except by unanimous agreement of the Executors and Trustees contemporaneously given.

4. The Executors and Trustees will continue to make quarterly distributions of net income and will furnish the income beneficiaries with quarterly statements of income and disbursements.

5. The provisions of this Agreement shall not be binding or enforceable unless and until same shall have been approved by one of the Surrogates of New York County,

in a proceeding brought contemporaneously with or as a part of the proceeding for the approval of the settlement and discontinuance of the right of election proceeding hereinabove referred to. The assignment and transfer of the mortgages and the transmittal of the funds hereinabove referred to shall thereupon be made contemporaneously with the consummation of the proposed agreement of settlement of the Widow's right of election proceeding.

6. This Agreement shall inure to the benefit of, and be enforceable against the parties, their respective heirs, executors and administrators.

IN WITNESS WHEREOF, the parties hereunto have set their hands and seals this 17th day of ^{August} July, 1970.

Blanche Dreifus
Blanche Dreifus, Individually
and as Executrix and Trustee

Leo Lemle
Leo Lemle, Executor and
Trustee

Clarence Lemle
Clarence Lemle, Executor and
Trustee

Stuart Lemle
Stuart Lemle, Remainderman

William Kessler
William Kessler, Esq.,
Guardian ad litem for Russell
Lemle, Lawrence Craig Lemle,
Robert Spencer Lemle, and
Laura Karen Lemle, infants,
pursuant to Order of the
Surrogate, dated 1970.

Bertha Lemle
Bertha Lemle, Individually
and as Executrix and Trustee

Jeannette Lemle Levine
Jeannette Lemle Levine

EXHIBIT I TO BLUM AFFIDAVIT - SUPPLEMENTAL
 AGREEMENT OF COMPROMISE OF CONTROVERSY
 DATED FEBRUARY 2, 1971
 SURROGATE'S COURT : COUNTY OF NEW YORK

-X

In the Matter of the Application of
 BERTHA LEMLE for a Determination of her
 Right under Section 18 of the Decedent
 Estate Law to Elect to take an Elective
 Share against the Provisions of the Last
 Will and Testament of

SUPPLEMENTAL
 AGREEMENT OF
 COMPROMISE OF
CONTROVERSY

P 7725/1964

JULIUS LEMLE,

Deceased.

-X

AGREEMENT made this 7th day of February 1971

by and among BERTHA LEMLE, LEO LEMLE, BLANCHE L. DREIFUS
 and CLARENCE LEMLE, as Executors of the Will of JULIUS
 LEMLE, deceased, BLANCHE L. DREIFUS, individually, BERTHA
 LEMLE, individually, JEANNETTE LEMLE LEVINE, and WILLIAM
 KESSLER, Guardian Ad Litem for the infants, J. STUART LEMLE,
 RUSSELL LEMLE, LAWRENCE CRAIG LEMLE, ROBERT SPENCER LEMLE,
 and LAURA CAREN LEMLE, and J. STUART LEMLE, individually.

W I T N E S S E T H:

WHEREAS, the parties hereto have entered into an
 agreement dated August 12, 1970, compromising and settling
 the above captioned proceeding; and

WHEREAS, the said settlement agreement of August 12,
 1970, is conditioned upon approval of this Court; and

WHEREAS, the parties hereto desire to amend and mod-
 ify the said settlement agreement of August 12, 1970, prior
 to its submission to the Court, so that the settlement

agreement of the parties will cover several collateral matters relating to the administration of the estate, as more specifically set forth below.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. This agreement shall be submitted to the Court for approval, simultaneously with the above mentioned settlement agreement of August 12, 1970 and this agreement shall become binding upon the parties, their respective heirs, executors, and administrators upon approval by the Surrogate.

2. The parties agree that any one or more of the executors of the estate of Julius Lemle, deceased, may petition the Court for approval of this agreement and of the aforesaid agreement of August 12, 1970.

3. The parties consent to payment by the Estate of Julius Lemle, deceased, of legal fees for services rendered in connection with this proceeding, as follows:

To Messrs. Delson & Gordon the sum of \$45,868.96 (including disbursements and trial counsel).

To Messrs. Aranow, Brodsky, Bohlinger, Einhorn & Dann the sum of \$14,490.88 (including disbursements).

4. BERTHA LEMLE, BLANCHE L. DREIFUS, CLARENCE LEMLE and LEO LEMLE, as executors of the estate of Julius Lemle, deceased, agree that simultaneously with the payments required to be made to Bertha Lemle under the settlement agreement of August 12, 1970, they will pay the unpaid balance of all of the specific legacies, without abatement

under the will of ^{A-79} Julius Lemle, deceased, and agree that the pre-residuary trust for the benefit of Rose Levine will not be reduced or abated by reason of this settlement. All of the parties hereto consent to the payment by said executors of the said legacies in full.

5. In the event that any distributions are made to Bertha Lemle in accordance with the terms and provisions of the Will of Julius Lemle, deceased, prior to approval by the Court of this agreement and the agreement of settlement dated August 12, 1970, then upon court approval of said agreements, such distributions shall be credited against the cash payments to be made to Bertha Lemle pursuant to Par. 2(b) of the agreement of settlement of August 12, 1970.

IN WITNESS WHEREOF, the parties have signed this agreement.

Bertha Lemle

Bertha Lemle, individually and as
Executrix of the Will of Julius Lemle,
Deceased

Blanche L. Dreifus

Blanche L. Dreifus, individually and
as Executrix of the Will of Julius
Lemle, Deceased

Leo Lemle

Leo Lemle, as Executor of the Will of
Julius Lemle, Deceased

Clarence Lemle

Clarence Lemle, as Executor of the Will
of Julius Lemle, Deceased

Jeannette Lemle Levine

Jeannette Lemle Levine

William Kessler

William Kessler, Esq., Guardian Ad Litem
for the infants, J. Stuart Lemle, Russell
Lemle, Lawrence Craig Lemle, Robert
Spencer Lemle, Laura Caren Lemle

J. Stuart Lemle

PLAINTIFF'S STATEMENT OF FACTS PURSUANT TO
RULE 9(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x		74CIV. 77 (W.C.C.)
BERTHA LEMLE,	:	Docket Number
Plaintiff,	:	STATEMENT OF FACTS
	:	<u>PURSUANT TO RULE 9g</u>
-against-	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	
-----x		

The following are material facts as to which
there is no genuine issue to be tried:

1. Plaintiff is the widow of Julius Lemle, who
died on December 8, 1964.

2. The Will of Julius Lemle provided for the
creation of a trust fund, the income of which was to be
distributed to plaintiff.

3. Plaintiff elected, pursuant to the laws of
the State of New York, to take her intestate share of her
husband's estate in lieu of her share under her husband's
Will.

4. Said election by plaintiff was contested by
the executors of the Estate of Julius Lemle, resulting in
protracted litigation in the Surrogate's Court, New York
County.

5. During the years 1965, 1966 and 1967 while
said litigation was pending, the executors of the Estate

of Julius Lemle made distributions to plaintiff pursuant to the terms of said Will.

6. Plaintiff, through her attorney, by letters dated December 7, 1965 and August 13, 1966 to the attorneys and accountants for the estate, respectively, gave notice that said distributions were being accepted as distributions of principal pursuant to her election and that she waived no claims or rights by accepting same.

7. Said distributions were reported to the Internal Revenue Service by the executors of the estate as being distributions of income.

8. Plaintiff's tax returns for 1965, 1966 and 1967 were audited by the Internal Revenue Service and deficiencies assessed in the sums of \$6,267.71 plus

\$1,255.54 in interest for the year 1965, \$8,097.54 plus \$1,133.66 in interest for the year 1966 and \$6,705.69 plus \$536.45 in interest for the year 1967 on the distributions to plaintiff from the estate.

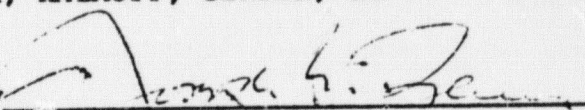
9. The proceeding in Surrogate's Court to determine plaintiff's right of election was terminated by an agreement of compromise dated August 12, 1970 which recognized plaintiff's right of election and fixed her share of the estate at \$453,712.25 payable out of the principal of the estate.

10. The Surrogate's Court, New York County, by decree dated April 7, 1971, determined that all payments made to plaintiff out of the estate, including specifically, the distributions made in 1965, 1966 and 1967, were distributions of the principal of said estate.

11. Plaintiff duly filed claims for refunds of the income tax paid on the distributions made in 1965, 1966 and 1967.

12. The Internal Revenue Service has allowed a marital deduction to the Estate of Julius Lemle resulting in a reduction of estate taxes in the amount of \$168,778.96 on the ground that payments to the plaintiff by the estate were distributions of principal.

BLUM, HAIMOFF, GERSEN, LIPSON & SZABAD

By 

Attorneys for Plaintiff
270 Madison Avenue
New York, New York 10016

ORDER DATED SEPTEMBER 23, 1974, THAT TIME OF
DEFENDANT TO ANSWER PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT IS EXTENDED, CONNER, J.

WGB:cb

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

BERTHA LEMLE,

:

Plaintiff, :

ORDER

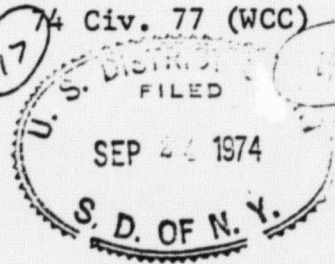
-v- :

UNITED STATES OF AMERICA,

:

Defendant. :

-----x



Defendant having applied pursuant to Rule 6(b)
of the Federal Rules of Civil Procedure for an enlargement
of its time to answer plaintiff's motion for summary judgment,

NOW, upon reading and filing the affidavit of
William G. Ballaine, Assistant United States Attorney, duly
sworn to on September 20, 1974, it is,

ORDERED, that the time of defendant to answer
plaintiff's motion for summary judgment be and hereby is
extended to and including October 18, 1974.

Dated: New York, New York

September 23, 1974

William E. Conner
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Plaintiff,

AFFIDAVIT

74 Civ. 77 (WCC)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

says :

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, attorney for defendant in this action. As such, I have primary responsibility for the defense of this action. I make this affidavit on the basis of personal knowledge, my review of pertinent Internal Revenue Service administrative files concerning plaintiff Bertha Lemle, conversations with officials of the Department of Justice and an interview with an Internal Revenue Service revenue agent who was primarily responsible for the tax refunds claims which are the subject of plaintiff's action.

2. This affidavit is respectfully offered in support of plaintiff's application, pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, for an enlargement of defendant's time to answer plaintiff's motion for summary judgment until October 18, 1974.

3. For her action, plaintiff seeks a refund of Federal income taxes for 1965, 1966 and 1967 in the total

sum of \$21,070.94 plus interest. By notice of motion dated August 19, 1974, plaintiff moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Upon agreement of the parties, defendant's answering papers must be served and filed today, September 20, 1974.

4. It appears that most if not all of the material facts in this action are not in dispute. In the years 1965 through 1967, plaintiff received distributions from the Estate of Julius Lemle, her late husband. These distributions were made by the Estate pursuant to Mr. Lemle's last will and testament which provided for plaintiff to receive net income for life of one-third of the decedent's residuary estate.

5. Plaintiff, however, rather than taking her interest under the will, filed an election under New York law (N.Y. Estates, Powers & Trusts Law § 5-1.1), claiming the right to take an intestate share of the Estate in lieu of taking under the will. In furtherance of her position to take an intestate share, plaintiff accepted the income distributions from the Estate but gave notice that she was treating the distributions as being distributions of principal--i.e., part of her "rightful" elective share.

6. In filing her Federal income tax returns for 1965, 1966 and 1967, plaintiff clearly indicated that she had received income distributions from the Estate but that she considered the distributions received to be payments of her share of corpus and thus not taxable under 26 U.S.C. § 102(a). Section

102(a) excludes from gross income the value of property acquired by bequest, devise or inheritance.

7. The Internal Revenue Service, however, determined that the distributions were subject to tax because, clearly, these sums had been distributed to her by the Estate as income from the residuary estate under her late husband's will. Under 26 U.S.C. § 102(b), the right to exclude inherited property from gross income does not extend to an inheritance of income from property, which is subject to income tax. While disagreeing with the Internal Revenue Service's position, plaintiff paid the taxes due on the distributions and filed refund claims for 1965, 1966 and 1967.

8. During this period, plaintiff was also engaged in proceedings in New York Surrogate's Court in an effort to sustain her claimed right to take an intestate share of the Estate rather than under the will. Finally, in 1971, three compromise agreements, executed by all appropriate parties, were submitted to and approved by the Surrogates Court.

9. In the agreements, the Executors of the Estate "recognized" the merit of plaintiff's right of election. The agreements provided that plaintiff be paid, as her elective share, the sum of \$453,712.25 "payable out of the principal" of the Estate, further stating that \$216,974.86 of said sum had already been paid to plaintiff (i.e. the income distributions previously made by the Estate under the will). The agreements indicated that the Estate would pay to the other two income beneficiaries of the decedent's residuary estate an amount equal to income taxes, interest

and penalties which might be payable to the Internal Revenue Service "on account of income taxes, by reason of the consummation of the agreement of settlement with the widow" and further stated that specified certified public accountants would prepare "whatever amended tax returns may be necessary for the Estate and Trust" and for the other two income beneficiaries.

10. As explained in a petition to the Surrogates Court signed by appropriate parties (including plaintiff and the other two income beneficiaries) the effect of these agreements was that all payments theretofore made by the Estate to plaintiff would "be deemed principal payments", the remaining two income beneficiaries would be "charged with the income earned by the residuary trust since its establishment", and the income beneficiaries and the trustees "will be required to file amended income tax returns for the years in question and payment of any tax due . . . will have to be made."

11. Plaintiff's claim herein is that these court-approved compromise agreements entitle her to treat the distributions received in 1965, 1966 and 1967 as principal rather than income distributions. In support of her claim, she offers a long line of cases commencing with Lyeth v. Hoey, 305 U.S. 188 (1938). Under these decisions, where a taxpayer receives portions of a decedent's estate in settlement of an action in which he has claimed rights in the estate as an heir or legatee of the decedent, such portions of the estate are excluded from taxation under 26 U.S.C. § 102(a), i.e., the portions are in effect a "bequest devise or inheritance" within the meaning of

section 102(a).

12. There is also a line of cases, however, which hold that if the Court settlement provides for settlement sums to be paid out of income from property of the estate, then such sums are taxable under 26 U.S.C. § 102(b). Harte v. United States, 252 F.2d 259 (2d Cir. 1958); Edwards v. Commissioner, 37 T.C. 1107 (1962). See also Williams v. Commissioner, 36 T.C. 195 (1961) (mere fact that payment is from income renders Section 102(b) applicable).

13. In the instant case, it appears that in the settlement, plaintiff tried to avoid the latter decisions by giving credit to the Estate for prior distributions but recasting those payments from income payments into principal payments, charging the Estate or the other income beneficiaries with the "additional" income which, under the will, had been allocable to plaintiff. None of the cases cited by plaintiff offer direct support for this type of settlement arrangement.

14. It is not disputed by plaintiff that, under the Internal Revenue Code, the Government is entitled to tax income generated by the Estate for 1965, 1966 and 1967. (See 26 U.S.C. §§ 661-663.) Plaintiff simply claims that, by reason of the agreements, she now is deemed to have received non-taxable principal from the Estate and thus any tax due should be paid by the Estate or the other two income beneficiaries to whom plaintiff's income was reallocated. Certainly it appears from the agreements that this result was intended since the agreements and the petition refer to the filing of amended income tax returns and the payment of additional taxes by the other two income beneficiaries for the years

in which plaintiff had received income distributions from the Estate.

15. The difficulty in this action, however, is that, to our knowledge, the other two income beneficiaries do not presently intend to file amended returns for 1965, 1966 and 1967, and it appears that the statute of limitations may bar the Internal Revenue Service from assessing these beneficiaries or the Estate by reason of the additional income allocable to them for 1965-1967 under the agreements.

16. At this point, the Government is not prepared to concede that decisions such as Lyeth v. Hoey, supra, entitle plaintiff to claim refunds for 1965, 1966 and 1967 as a result of settlement agreements which retroactively recast income distributions into principal distributions. We believe that to sanction such recasting may do violence to the principles of annual accounting, which principles form the foundation of the Federal taxing systems. See discussion in Burnett v. Sanford & Brooks Co., 282 U.S. 359 (1931). The Government's concern is clearly underscored by the fact that, if plaintiff does receive refunds, the Internal Revenue Service may never be able to collect taxes which are clearly due. This result would not be a consequence of any error or omission by the Government, but rather of an agreement among other parties relating to their tax status in years as to which the limitations period for assessment and collection of taxes has already run against the Internal Revenue Service.

17. Whatever the legal rights between the United States and plaintiff, however, it seems clear that the

most equitable resolution of this dispute would be to provide plaintiff some form of refund or credit and to obtain appropriate payment from the Estate or the other two income beneficiaries. Recognizing this, the Department of Justice and the Internal Revenue Service are now considering ways in which to effect this result. One possibility under consideration is an action against the Estate and the other two income beneficiaries which would be commenced in this Court and, perhaps, consolidated with the instant action.

18. Because the Government is considering ways to effect an equitable and legally sound resolution of this matter, we believe it would be premature and inadvisable to concede or resist the difficult legal arguments inherent in plaintiff's summary judgment motion. Accordingly, we respectfully request a one month adjournment of the Government's time to answer plaintiff's motion. During this period, this office expects to be in consultation with the Department of Justice and the Internal Revenue Service in an effort to arrive at an equitable solution which will not do violence to the Government's tax needs.

19. I have discussed our intentions with counsel for plaintiff and, as a courtesy, am sending him a copy of the Government's application.

WHEREFORE, affiant respectfully requests that the Court grant defendant's application for an extension of time to answer plaintiff's motion for summary judgment until October 18, 1974.

Sworn to before me this
20th day of September
1974.

Notary Public

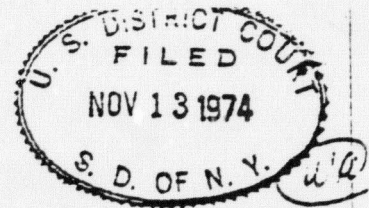
William G. Ballaine
WILLIAM G. BALLAINE
Assistant United States Attorney

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0994500
Qualified in Kings County
Ct. filed in New York County
Term Expires March 30, 1975

NOTICE OF MOTION BY DEFENDANT FOR SUMMARY
JUDGMENT

WGB:11f
74-0057

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
BERTHA LEMLE,

Plaintiff,

-v-

UNITED STATES OF AMERICA,

Defendant.
-----x

NOTICE OF MOTION BY
DEFENDANT FOR SUMMARY
JUDGMENT

: 74 Civ. 77 (WCC)

PLEASE TAKE NOTICE that upon the annexed affidavit of Edward R. Levitus, sworn to November 11, 1974, the pleadings herein and the annexed statement pursuant to Rule 9(g) of the General Rules of the Court, defendant United States of America will move this Court, before the Honorable William C. Conner, on November 28, 1974 at the United States Court House, Foley Square, New York, New York, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of defendant upon the ground that there is no genuine issue for trial and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 11, 1974

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: William G. Ballaine
WILLIAM G. BALLAINE
Assistant United States Attorney
United States Courthouse
Foley Square
New York, New York 10007
Telephone (212) 791-1966

WGB:ilf
74-0057

TO: Blum, Haimoff, Gersen, Lipsen & Szabad, Esqs.
Attorneys for Plaintiff
270 Madison Ave.
New York, N. Y. 10016

WGS:ST
74-0057
n-446

A-93

AFFIDAVIT OF EDWARD R. LEVITUS, FOR DEFENDANT,
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
BERTHA LEMLE,

Plaintiff,

-v-

UNITED STATES OF AMERICA,

Defendant.
----- x

:

:

:

:

:

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:

AFFIDAVIT IN SUPPORT
OF DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT
74 Civ. 77 (WCC)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

EDWARD R. LEVITUS, being duly sworn deposes and

says:

1. I am employed by the Internal Revenue Service as an examining officer at the office of the Manhattan District Director, New York, New York. This affidavit is based upon personal knowledge and upon my review of work papers which I prepared and maintained in connection with tax refund claims of Bertha Lemle as hereafter described.

2. I make this affidavit in support of defendant's motion for summary judgment and in opposition to plaintiff's motion for summary judgment.

3. In early 1970, I was assigned the responsibility of reviewing Form 843 refund claims for 1965, 1966 and 1967 filed on behalf of Bertha Lemle, the plaintiff in this action. Copies of these same refund claims are attached to plaintiff's complaint herein. Mrs. Lemle's refund claims related to distributions of income which she had received in 1965, 1966 and 1967 from the Estate of Julius Lemle. Mrs. Lemle claimed that these distributions were payable to her on account of her share of the corpus of the Estate and that she was entitled to such a share of the corpus under a right of election as surviving spouse of Julius Lemle.

4. During early 1970, I spoke with attorneys with the law firm of Blum, Haimoff, Gersen, Lipson & Szabad, who represented Mrs. Lemle. They asked me to hold up Mrs. Lemle's refund claims pending a possible settlement of her claim to an elective share of the Estate. In August 1970 I was advised that the parties had drawn up an agreement recognizing the validity of Mrs. Lemle's right of election. I was also advised that the Surrogate's Court might hold that the payments received by Mrs. Lemle in 1965 through 1967 represented principal.

5. On or about April 27, 1971, I was advised that the Surrogate's Court had given final approval to a settlement which included the treatment of the 1965-1967 income distributions as being part of Mrs. Lemle's share of the corpus of the Estate. In the succeeding months I was sent the various settlement documents, including the August 12, 1970 agreement of compromise which sets forth Mrs. Lemle's right to an elective share of corpus.

6. The settlement agreements envisioned "deeming" the 1965, 1966 and 1967 income distributions to Mrs. Lemle as being of principal, not income, thus making it necessary to charge those 1965-1967 income distributions to other parties to the settlement. The agreements seemed to recognize this since they referred to the possible necessity of other parties' filing amended tax returns and being reimbursed by the Estate for any additional taxes paid the Internal Revenue Service. However, this arrangement concerned me because of the three-year statute of limitations for assessment and collection of taxes set forth in 26 U.S.C. § 6501. When I was advised in August 1970 of the agreement reached by the parties, the limitations already appeared to have expired for tax years 1965 and 1966 and by the time I

learned that the agreements had been finally approved by the Surrogate's Court and had received all pertinent documents, it appeared the statute had run on 1967 as well. Thus, it seemed possible that the other parties who were to be charged with the income distributions for 1965-1967 could not be reached by the Internal Revenue Service for purposes of assessment and collection of taxes which might be due for those years.

7. During 1971 and 1972 I had various conversations with a Mr. Gillman, one of the accountants for the trust set up under Julius Lemle's will. I also spoke during this period with a Norman Moloshok, an attorney with Delson and Gordon. I believe Delson and Gordon represented Blanche Dreifus, one of the parties to the settlement. In early July 1971 Mr. Moloshok indicated to me that Mr. Gillman would prepare appropriate amended tax returns for 1965, 1966 and 1967 as envisioned in the settlement agreements. Later that same month Mr. Moloshok advised that amended returns would not be filed until it was determined how much of a marital deduction the Estate would receive as a result of the settlement. He indicated that if the marital deduction were not obtained, amended returns might not be filed.

8. Thereafter, I continued to hold Mrs. Lemle's refund claims pending the filing of amended tax returns by the other parties to the settlement. Finally, in October 1973 I was advised by a Mr. Kehlmann of Blum, Haimoff, Gersen, Lipson & Szabad that, apparently, the other parties to the settlement agreements would not be filing amended returns.

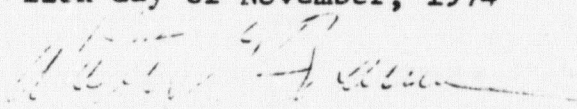
9. To the best of my knowledge, information and belief, no amended returns for 1965, 1966 or 1967 have been filed as of the date of this affidavit.

WHEREFORE, your deponent respectfully requests that summary judgment be granted in favor of defendant against plaintiff and that plaintiff's complaint in this action be dismissed.



EDWARD R. LEVITUS

Sworn to before me this
11th day of November, 1974



WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1978

DEFENDANT'S STATEMENT OF FACTS PURSUANT TO
 RULE 9(g)
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----x
 BERTHA LEMLE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

:
 :
 : DEFENDANT'S STATEMENT
 : OF FACTS PURSUANT TO
 : RULE 9(g)
 :
 : 74 Civ. 77 (W.C.C.)
 :

-----x
 Pursuant to Rule 9(g) of the General Rules of
 this Court, defendant United States of America submits this
 statement of material facts as to which it contends there is
 no genuine issue to be tried:

1. Defendant incorporates herein by
 reference nos. 1 through 4 and 6 of the state-
 ment of facts pursuant to Rule 9(g) submitted
 on behalf of plaintiff in this action
 ("Plaintiff's 9(g)").

2. Defendant incorporates herein by
 reference no. 5 of Plaintiff's 9(g) and
 adds that the distributions made by the
 executors to plaintiff in 1965, 1966 and
 1967 were made as income, not principal
 distributions in accordance with the will.

3. Defendant incorporates herein by
 reference no. 7 of Plaintiff's 9(g) and adds
 that the distributions to plaintiff as
 reported by the executors were deductible
 from the taxable income of the trust or
 estate which made said distributions to
 plaintiff.

4. Defendant incorporates herein by reference no. 8 of Plaintiff's 9(g) and adds that the deficiencies were assessed and collected from plaintiff in 1969.

5. Defendant incorporates herein by reference no. 11 of Plaintiff's 9(g) and adds that such claims were filed on or about August 14, 1969.

6. At the close of 1969, there had been no legal resolution as to whether plaintiff had any right to take an elective share of the Estate or as to how much of any such share plaintiff would be entitled to receive in principal and how much she would be entitled to receive in income from the Estate.

7. Two compromise agreements, dated August 12, 1970, and one compromise agreement, dated February 2, 1971, were entered into by certain parties in connection with the litigation of plaintiff's right to an elective share of the Estate of Julius Lemle. The three agreements, which are attached to Plaintiff's Affidavit in Support of her Motion for Summary Judgment ["Plaintiff's Aff."] as Exhibit "I", are incorporated herein by reference.

8. A supplemental petition for compromise of proceeding was submitted to the Surrogate's Court, New York County, setting forth certain aspects of the three compromise

agreements and asking for leave to compromise the litigation of plaintiff's right to an elective share of the Estate. The petition, which is attached to Plaintiff's Aff. as Exhibit "H", is incorporated herein by reference.

9. On April 7, 1971, the Surrogate's Court signed a decree approving the three compromise agreements. The decree, which is attached to Plaintiff's Aff. as Exhibit "G", is incorporated herein by reference.

10. Neither the United States nor any of its agents was a party to the compromise agreements or to the Surrogate Court proceeding which resulted in execution of the April 7, 1971 decree approving said agreements.

11. The Internal Revenue Service has allowed a marital deduction to the Estate of Julius Lemle for the sum of \$453,712.25 pursuant to 26 U.S.C. § 2056.

12. No amended tax returns have been filed or additional federal income taxes paid by any parties to the compromise agreements with respect to the income distributions which had been made by the Estate in 1965, 1966 and 1967 to plaintiff as an income beneficiary under the will.

13. In early 1970, before any of the settlement agreements had been signed, the Internal Revenue Service examiner who had responsibility for reviewing the refund claims filed by plaintiff, spoke with the attorneys for Mrs. Lemle. At that time, the Internal Revenue Service examiner was asked to hold up a disposition of plaintiff's refund claims pending a possible settlement of the litigation of plaintiff's right to an elective share of the Estate of Julius Lemle.

14. In early July 1971, after the Surrogate's Court had signed the decree approving settlement, the Internal Revenue Service examiner spoke to one of the attorneys representing Blanche L. Dreifus, a party to the settlement. The attorney represented that amended tax returns would be prepared for 1965, 1966 and 1967 as envisioned in the settlement agreements. Later that same month, the examiner was told by Mr. Gillman, an accountant for the trust set up under the will, that amended returns would not be filed until it was determined how much of a marital deduction the Estate would receive as a result of the settlement.

15. After the Estate had received from the Internal Revenue Service a deduction for the full amount of the settlement payable to plaintiff, pursuant to 26 U.S.C. § 2056, the examiner responsible for plaintiff's refund claims learned that the other parties to the settlement would not be filing amended returns for 1965, 1966 or 1967.

Pursuant to Rule 9(g), defendant United States raises the following objections to certain of the statements set forth in Plaintiff's 9(g) statement:

i. With respect to no. 5 of Plaintiff's 9(g), the executors of the Estate of Julius Lemle made distributions to plaintiff pursuant to the terms of the will both during 1965, before plaintiff formally exercised her right of election, and during 1966 and 1967, after plaintiff's exercise of her right of election resulted in protracted litigation.

ii. With respect to no. 9 of Plaintiff's 9(g), the agreements of compromise dated August 12, 1970 did not terminate the Surrogate's Court proceeding on that date because said agreements were subject to approval by the Surrogate, which approval was formally given in the decree signed April 7, 1971.

iii. With respect to no. 10 of Plaintiff's 9(g), defendant respectfully refers plaintiff to the terms of the decree, which is incorporated by reference in this statement and speaks for it.

iv. With respect to no. 12 of Plaintiff's 9(g), defendant respectfully refers plaintiff to no. 11 of this statement set forth above.

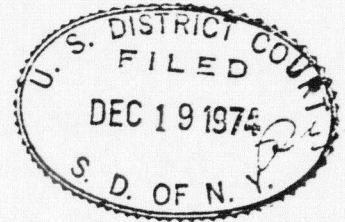
Dated: New York, New York
November 12, 1974

PAUL J. CURRAN
United States Attorney for
the Southern District of
New York
Attorney for Defendant

By: _____

WILLIAM C. BALDINE
Assistant United States
Attorney
United States Court House
Foley Square
New York, New York 10007
Tel: (212) 791-1966

REPLY AFFIDAVIT OF JOSEPH G. BLUM, FOR PLAINTIFF, IN RESPONSE TO THE AFFIDAVIT OF EDWARD R. LEVITUS



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
: 74 Civ. 77 (WCC)
BERTHA LEMLE, :
: REPLY AFFIDAVIT
Plaintiff, :
:
-against- :
:
UNITED STATES OF AMERICA, :
:
Defendant. :
:
-----X

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

JOSEPH G. BLUM, being duly sworn, deposes and says:

1. This affidavit is submitted in reply to the affidavit of Edward R. Levitus in the above-captioned matter.

2. I do not consider it particularly significant that anyone told or did not tell the examining agent to hold up the refund claims. That has nothing to do with the validity of plaintiff's position here.

3. My recollection, however, is different from that of Mr. Levitus. I cannot recollect ever advising him to hold up the refund claim. My only recollection is that he was continually advised as to the progress of the claim against the Lemle estate. However, despite its awareness the defendant never sought to intervene in the proceeding in the Surrogate's Court or even to voice any objection thereto.

4. I cannot understand Mr. Levitus' statement (Par. 6) that other persons could not be charged with distributions. At all times the IRS knew the identity of such persons and my client's position that her distributions were principal. The IRS could easily have assessed such persons then, and may well be able to assess them now depending on the amount of their underpayment and the year the IRS will wish to consider them as having received the income.

5. I have annexed to my affidavit a Xerox copy of a Form 4549 containing Mr. Levitus' signature and dated June 15, 1971. I find it surprising that in his affidavit Mr. Levitus expresses concern about the settlement in 1970 while on June 15, 1971 his initial determination allowed the claims in full based upon the Surrogate's Court determination. This reinforces the statements contained in paragraph 7 of my original affidavit sworn to on August 19, 1974.

Sworn to before me this

18th day of December, 1974.

Alan D. Pekelner
Notary Public

Joseph G. Blum
Joseph G. Blum

ALAN D. PEKELNER
Notary Public, State of New York
No. 31-3051375
Qualified in New York County
Commission Expires March 30, 1978

EXHIBIT TO BLUM REPLY AFFIDAVIT - FORM
4549 SIGNED BY LEVITUS, DATED 6/15/71

U.S. GOVERNMENT PRINTING OFFICE: 1970-378-365

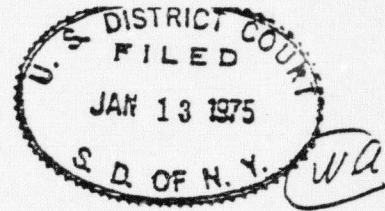
PAGE ____ OF ____ PAGES

FORM 4549 (REV. JUNE 1970)		DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE INCOME TAX AUDIT CHANGES		RETURN FORM NO. 1040	
NAME AND ADDRESS OF TAXPAYERS BERTHA LEMLE 410 BLUM HAIMOFF GERSEN & SZABAD 270 MADISON AVE NEW YORK N.Y. 10016		S.S. OR E.I. NUMBER 62-40 3108		FILING STATUS Single	
		PERSON WITH WHOM AUDIT CHANGES WERE DISCUSSED		NAME AND TITLE MR. S.J. KEHLHANN ATTORNEY	
1. ADJUSTMENTS TO INCOME		YEAR: 1961	YEAR: 1966	YEAR: 1967	
A. TRUST INCOME		20173.33	23930.71	19146.35	
B. EXEMPTIONS		1200.00	1200.00		
C. STANDARD DEDUCTION		1000.00	1000.00	419.00	
D.					
E.					
F.					
G.					
2. TOTAL ADJUSTMENTS		17973.33	21730.71	18727.35	
3. ADJUSTED GROSS OR TAXABLE INCOME SHOWN ON RETURN OR AS PREVIOUSLY ADJUSTED		20805.14	24542.28	22711.2	
4. CORRECTED ADJUSTED GROSS OR TAXABLE INCOME		29140.1	28615.7	4024.00	
5. TAX		203.00	187.00	700.00	
6. ALTERNATIVE TAX IF APPLICABLE (From Page ____)					
7. TAX SURCHARGE					
8. CORRECTED TAX LIABILITY (Lesser of line 5 and 6 plus line 7)		203.00	187.00	700.00	
9. LESS CREDITS (Specify)	A. RETIREMENT INCOME	203.00	187.00	224.00	
	B.				
	C.				
10. BALANCE (Line 8 less amounts on lines 9A through 9C)		-0-	-0-	471.00	
11. PLUS:	A. TAX FROM RECOMPUTING PRIOR YEAR INVESTMENT CREDIT				
	B. SELF-EMPLOYMENT TAX				
	C.				
12. TOTAL CORRECTED INCOME TAX LIABILITY (Line 10 plus amounts on lines 11A through 11C)		-0-	-0-	471.00	
13. TOTAL TAX SHOWN ON RETURN OR AS PREVIOUSLY ADJUSTED		6267.71	7007.54	7176.64	
14. STATUTORY DEFICIENCY OR (OVERASSESSMENT) (Difference between lines 12 and 13)		6267.71	7007.54	6705.64	
15. PENALTIES		NONE	NONE	NONE	
OTHER INFORMATION CLAIMS ARE ALLOWED IN FULL BASED UPON ULTIMATE DETERMINATION OF SURROGATES COURT AS TO RIGHT OF ELECTION AS OPPOSED TO PROVISIONS OF LAST WILL & TESTAMENT OF JULIUS LEMLE					
EXAMINING OFFICER'S SIGNATURE		DISTRICT		DATE	
[Signature]		Manhattan		6-15-71	
Consent to Assessment and Collection - I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in the United States Tax Court the findings in this report; therefore, I give my consent to either (1) the individual assessment and collection of the deficiency shown on line 14, plus any interest due on this tax, and also any penalties shown on line 15 or (2) the overassessment shown on line 14, plus any interest and adjusted by any penalties shown on line 15. It is understood that this report is subject to acceptance by the District Director.					
NOTE: If a joint return was filed, both taxpayers must sign	SIGNATURE OF TAXPAYER	DATE	SIGNATURE OF TAXPAYER	DATE	
	BERTHA LEMLE	6/28/71			
BY	TITLE		DATE		

REPLY AFFIDAVIT OF EDWARD R. LEVITUS, FOR
 DEFENDANT IN RESPONSE TO REPLY AFFIDAVIT OF
 JOSEPH G. BLUM

WGB:ml
 74-0057

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK



----- x

BERTHA LEMLE,

Plaintiff,

- v -

UNITED STATES OF AMERICA,

Defendant.

----- x

DEFENDANT'S REPLY
AFFIDAVIT

74 Civ. 77 (WCC)

STATE OF NEW YORK)
 COUNTY OF NEW YORK :
 SOUTHERN DISTRICT OF NEW YORK)

ss.:

EDWARD R. LEVITUS, being duly sworn, deposes and
 says:

1. I am employed by the Internal Revenue Service
 as an examining officer at the office of the Manhattan
 District Director, New York, New York. I have read the reply
 affidavit of Joseph G. Blum in this action and submit this
 affidavit in response to certain statements made in that
 affidavit.

2. Mr. Blum states that he does not recall advising
 me to hold up the refund claim of Bertha Lemle. I did not
 state in my earlier affidavit to the Court, sworn to Novem-
 ber 11, 1974, that Mr. Blum, himself, ever asked me to hold up
 the disallowance of the refund claims, but rather that one of
 the attorneys in his law firm asked me to do so. However, I
 believe it was Mr. Blum who made this oral request as clearly
 appears from a confirmatory letter dated May 4, 1970, signed
 by Mr. Blum. A photocopy of this letter is attached hereto
 as Exhibit A.

3. Mr. Blum states that he "cannot understand" why
 other persons could not be charged with the income distributions
 which, under the settlement arrangement, were "deemed" payments

of principal. The simple answer is that any assessment by the Internal Revenue Service prior to the execution and approval of the settlement agreements in 1971 against other taxpayers involved in the Surrogate's Court proceeding would have been a harsh solution based upon pure speculation. In 1965, 1966 and 1967 it was not disputed that the Estate had made distributions of income to Mrs. Lemle pursuant to the will of Julius Lemle and that Mrs. Lemle claimed to take these distributions as principal payments which were part of her elective share. However, it was also undisputed that, at the end of 1967, Mrs. Lemle's right to take an elective share, as opposed to taking under the will, was in litigation and thus entirely uncertain.

4. Given the legal uncertainties, the only way in which the Government could have been fully protected by "charging other persons with income distributions," as suggested by Mr. Blum, would have been by assessing every taxpayer who might conceivably have been charged with the income distributions under a settlement arrangement or an adjudicated disposition, including, of course, Mrs. Lemle, and to make each assessment for the full amount of income distributions made to Mrs. Lemle during 1965, 1966 and 1967. Such assessments would have been based upon pure speculation as to the results of Mrs. Lemle's litigation, whereas the assessment against Mrs. Lemle alone was grounded on the undisputed fact that, at the close of tax years 1965, 1966 and 1967, the distributions made to her had been made by the Estate as income distributions pursuant to the will.

5. Mr. Blum finds it "surprising" that in my prior affidavit I mentioned my concern about the settlement. Presumably to highlight his surprise, Mr. Blum attaches a form 4549, signed by me and dated June 15, 1971, in which,

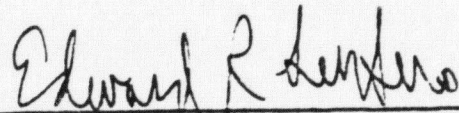
based upon the settlement, I allowed Mrs. Lemle's claims in full.

6. It is quite true that I prepared and signed the form attached to Mr. Blum's affidavit. I did so on the grounds that the people with whom I had been dealing appeared respectable and above-board and that the taxpayers to whom the tax burden was purportedly shifted under the settlement appeared to be people of means. Thus, on June 15, 1971, I thought I was justified in concluding that all the income generated by the Estate during 1965, 1966 and 1967, including that income which had been distributed to Bertha Lemle in those years, would be reported on someone's income tax returns and that all tax payments due thereunder would be made. This result was satisfactory to me since in protecting the Government's interest, my primary concern was simply that all income distributions be reported and that income taxes be paid in whatever amounts were accurately computed by the taxpayers to be due.

7. As Mr. Blum should well know, however, my own initial determination, as reflected in the form 4549, was not the final determination of the Internal Revenue Service. I reviewed my own determination with supervisory personnel. They did not disagree entirely with my proposed method of dealing with this matter, but did tell me that Mrs. Lemle's refund claims should not be allowed until the other parties to the settlement agreement actually filed amended returns and paid income taxes due as set forth in the agreements. It was in large part because of my conversations with these supervisory personnel that I began to recognize the statute of limitations problem which could result if the Internal Revenue Service were to grant Mrs. Lemle a refund for tax years 1965, 1966 and 1967 and trust that other parties to the settlement would file amended returns and pay any taxes due. Accordingly, I

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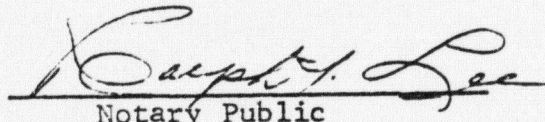
told Mrs. Lemle's attorneys that her refund claims would not be allowed until amended returns were filed and income taxes paid as envisioned in the settlement agreements. In my prior affidavit to this Court, I already indicated how I was told by various people first that amended returns would be filed, then that they would be filed only after a determination was made as to the Estate's claim for a substantial marital deduction, and finally that no amended returns would be filed.



EDWARD R. LEVITUS

Sworn to before me this

13th day of January 1975.



Notary Public

JOHN LEE
Notary Public, State of New York
No. 41-220838 Queens County
Term Expires March 30, 1975

A-110

EXHIBIT A TO LEVITUS REPLY AFFIDAVIT -
LETTER FROM JOSEPH G. BLUM TO MR.
LEVITUS DATED MAY 4, 1970

LAW OFFICES

BLUM, HAIMOFF, GERSEN, LIPSON & SZABAD
270 MADISON AVENUE, NEW YORK 10016

TELEPHONE MURRAY HILL 2-6303

JOSEPH G. BLUM
JUDITH HAIMOFF
DANIEL GERSEN
HAROLD LIPSON
EUGENE W. SZABAD
HERBERT W. LIPSON
BENJAMIN L. LIPSON
MURRAY A. NIEDERLAND
ROBERT M. LAYTON

EMANUEL D. FINKELMAN
REYNOLD J. KERNAN
JOSEPH W. GREENBERG
HOWARD A. EDMA
DANIEL COHEN
ALAN D. FINKELNER
STUART H. HARTFIELD
IAN R. FELDMAN

SECRETARY
MORTIS WEINFIELD
JULIE
RECEPTIONIST

TELETYPE UNIT
FAX UNIT

TELEPHONE UNIT
CHOPPERMAN BLUM
WASHINGTON, D.C.
STEERING GROUP

May 4, 1970.

National Revenue Service
P. O. Box 3100
Chrison Street Station
New York, N. Y. 10008

Attn: Field Group 204 - FL

Dear Mr. Levitus:

Re: Mrs. Bertha Lemle

I wish to confirm our telephone conversation of today, in which I advised you that, in my opinion, it would be most beneficial if you were to hold the claim of Mrs. Bertha Lemle in view of the fact that a determination of her status will probably be made before the Surrogate before whom the case is to be tried on May 26th. This will result in a solidification of our position and will serve to clarify the issues which must be considered by you.

Thank you for your courtesy.

Very truly yours,

Joseph G. Blum

JGB:LM

A-111
MEMORANDUM OPINION AND ORDER DATED MARCH 31,
1975, CONNER, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

BERTHA LEMLE,

Plaintiff,

74 Civ. 77
(WCC)

- against -

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM
AND ORDER

----- X
CONNER, D. J.:

This action for the return of wrongfully assessed and collected federal income tax is presently before the Court on cross-motions for summary judgment. Although the facts are largely undisputed, detailed recitation of the factual background is necessary to render the legal issues understandable.

I.

In November, 1965 the Last Will and Testament of plaintiff's recently deceased husband was admitted to probate by the Surrogate's Court, New York County. The Will provided, inter alia, that plaintiff was to receive the net income of decedent's residuary estate for the duration of her life. In late November, 1965 the Estate made payments pursuant to the Will by checks which recited the words

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"income distribution." Although plaintiff retained her check, her attorney wrote to the attorneys representing the Estate that

"no inference will be drawn from the issuance and acceptance of the check as to Mrs. Lemle's rights as a surviving spouse."

The letter further stated that the

"payment is made to her on account of the monies she will ultimately be entitled to receive out of the estate, whether by way of principal or income."

On February 3, 1966 plaintiff exercised her right to elect to take her statutory one-third share of the Estate in lieu of her share under the Will, pursuant to Section 18-d of the New York Decedent Estate Law. ^{1/} The Executors ^{2/} rejected plaintiff's claim on the ground that she had relinquished this right in an ante-nuptial agreement. Accordingly, throughout 1965-1967 the Executors of the Estate made distributions to plaintiff in accordance with the terms of the Will and reported these distributions in its tax returns as distributions of income to a beneficiary, deducting these amounts from its taxable income pursuant to Section 661 of the Internal Revenue Code, 26 U.S.C. § 661. Plaintiff, however, maintained that she was accepting these distributions as part of her elective share and filed income tax returns in which she treated these sums as distributions of principal excludible from gross

income in accordance with Section 663 of the Internal Revenue Code, 26 U.S.C. § 663. In addition, in February, 1967 plaintiff brought an action in the Surrogate's Court seeking to vindicate her claimed right of election, a proceeding which was both protracted and fervently contested.

An audit of plaintiff's tax returns for the years 1965, 1966 and 1967 resulted in an assessment of deficiencies in the sums of: \$6,267.71 plus interest of \$1,253.54 for 1965; \$8,097.54 plus interest of \$1,333.66 for 1966; and \$6,705.69 plus interest of \$539.45 for 1967. The deficiencies assessed against plaintiff represented the tax payable on the sums received by plaintiff, if treated as distributions of income. The deficiencies were paid by plaintiff in August, 1969, at which time she filed claims for refunds, asserting that the trust income taxed to her should properly have been taxed to others and that the sums represented distributions to her on account of her share of the corpus.

In May, 1970 plaintiff's attorney advised Mr. Edward R. Levitus, the Internal Revenue Service [IRS] examiner who was in charge of plaintiff's claim, that it would be "most beneficial" if he would delay final determination pending the resolution of the proceedings in the Surrogate's Court.

The parties finally reached an accord and entered into three compromise agreements which were incorporated,

by reference, into an order of the Court dated April 7, 1971. The decree provided that plaintiff would receive \$453,712.25 in full satisfaction of her claimed right to elect against the Will. The agreement further provided that such payment consisted of principal from the Estate and that prior distributions would be considered as part payment of the total principal due her. Apparently, in order to resolve plaintiff's outstanding tax problems, the agreement provided that Blanche L. Dreifus and Jeanette Lemle Levine, the two other income beneficiaries of the Estate, would be chargeable with all taxes, interest and penalties due to the IRS (which sums would be paid by the Estate) and that the Estate would prepare and file whatever amended returns would be necessary to effectuate the terms of the compromise.

The agreement also recited that the settlement figure was fair and equitable to the Estate and the other beneficiaries because if plaintiff had prevailed she would have been entitled to 1/3 of the adjusted gross estate, i.e., \$772,038.86, as well as 1/3 of all income received by the Estate and 1/3 of all appreciation in value of the assets of the Estate since the death of Julius Lemle.^{3/}

On June 15, 1971, Mr. Levitus, in reliance upon the settlement, signed a form 4549 statement allowing plaintiff's claims in full. This determination, however, was subject to review by his supervisors who concluded that the

claims should not be allowed until the other parties to the settlement actually filed amended returns and paid the taxes as agreed. At about this time, it came to light that, as to the other parties to the settlement, the three-year period for the assessment of taxes by the Government, 26 U.S.C. § 6501, had apparently expired. Accordingly, several inquiries were made in order to resolve plaintiff's claim for a refund; the history of the further attempts by Mr. Levitus is uncontested.

In July, 1971 Mr. Levitus had conversations with an attorney for one of the beneficiaries who had obligated herself to file an amended return. Mr. Levitus was advised at first that an accountant for the trust would prepare the amended returns and later that the amended returns would not be filed until it was determined how large a marital deduction the Estate would receive as a result of the settlement.

Although the Estate subsequently received a deduction for the full amount of the settlement, Mr. Levitus was informed that the other parties to the settlement would not be filing amended returns for 1965, 1966 or 1967. To date, no amended returns have been filed.

II.

The crux of plaintiff's argument is that she is entitled, by virtue of the state court proceedings, to treat the 1965-1967 distributions as property acquired by inheritance and thus excludible from gross income pursuant to Section 102(a) of the Internal Revenue Code, 26 U.S.C. & 102(a). The Government, on the other hand, contends that the distributions were distributions of income generated by Estate property and thus includible in plaintiff's gross income pursuant to Sections 102(b) and 662 of the Internal Revenue Code, 26 U.S.C. §§ 102(b), 662. The Government further asserts that it is in no way bound by the compromise decree which purported to characterize the 1965-1967 distributions as distributions of principal not subject to federal income tax.

III.

Plaintiff relies substantially on the United States Supreme Court decision of Lyeth v. Hoey, 305 U.S. 188 (1938), and its progeny, for the proposition that she is entitled to treat the sums received by her during 1965, 1966 and 1967 as principal.

In Lyeth v. Hoey, the decedent left small legacies to her heirs, and the entire residuary estate of approximately \$3,000,000 to a fund for the establishment of a specified

foundation. The heirs contested probate and subsequently a compromise was reached and a distribution made. The Commissioner of Internal Revenue evaluated the plaintiff's share and treated the whole amount as income for that year.

The Supreme Court ruled that petitioner's status as an heir was not altered because his right to an inheritance was finally settled by compromise and that the exemption from income of gifts received by inheritance applied. The Court stated:

"Petitioner was concededly an heir of his grandmother under the Massachusetts statute. It was by virtue of the heirship that he opposed probate of her alleged will which constituted an obstacle to the enforcement of his right. * * *

"There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, because of his standing as an heir and of his claim in that capacity."
305 U.S. at 195-96.

Thus, Lyeth v. Hoey established that money received by an heir pursuant to the settlement of a will contest is to be treated as if it were acquired by inheritance. Harte v. United States, 252 F.2d 259, 261 (2d Cir. 1958).

The Government, however, asserts that Lyeth v. Hoey and its progeny are inapposite. In this respect, the Government points out that those cases involved situations where prospective settlement proceeds were subjected to original classification for federal income tax purposes, whereas in

the case at bar the parties intended to recharacterize distributions previously made and classified for tax purposes. It is urged that such a settlement cannot, as a matter of law, bind the Government.

This argument, however, ignores the import of the Supreme Court's decision in Lyeth v. Hoey, that proceeds obtained by compromise must be characterized, for purpose of federal income tax, according to the claims asserted and settled in the litigation.^{4/} Elrick v. C.I.R., 485 F.2d 1049, 1054 (D.C.Cir. 1973); Howard v. C.I.R., 447 F.2d 152, 155-56 (5th Cir. 1971); Larchfield Corp. v. United States, 243 F.Supp. 926, 943 (D.Conn. 1965), aff'd, 373 F.2d 159 (2d Cir. 1966).

Thus, plaintiff maintained throughout^{5/} that she was entitled to one-third of the principal of the Estate, and the compromise agreement was intended to reflect a concession to this claim to principal. Moreover, plaintiff is concededly the wife of the testator and would, ordinarily, under the New York statute have been entitled to elect to take a one-third share of the estate against the Will. There can be no question that she obtained the settlement for this reason. Cf. Lyeth v. Hoey, supra at 195-96.

Harte v. United States, supra, is instructive. In Harte, although the testator left an estate valued in excess of \$3,000,000, the plaintiff, his only living descendant, was

bequeathed only a \$5,000 trust fund. The plaintiff filed objections to the will and, after many years, negotiated a settlement with the other legatees. The agreement provided, inter alia, that certain shares of stock, as well as some money representing dividends on that stock, would be held in trust for the benefit of the plaintiff; in addition, it provided that the trustee was to pay to the plaintiff \$208.33 per month, for life, in settlement of her claims.

The plaintiff reported the receipt of these sums, but did not include them in taxable income. The Commissioner of Internal Revenue determined that they were payments of income and assessed a deficiency which the plaintiff paid under protest.

The Court of Appeals, in upholding the determination of the Commissioner, ruled that the terms of the settlement agreement are of critical importance, the Court stating,

"determination of whether these monthly payments totalling \$2500.00 annually, were properly subjected to income taxation depends upon whether, under the settlement agreement, the payments were to be made from property, or from income from property." (Emphasis added)
252 F.2d at 261

After examining the agreement, the Court found that it reflected an understanding that the plaintiff's primary interest was in the income from the trust fund, and concluded that the monthly payments should have been included in gross income. 252 F.2d at 262.

Here, by contrast, the settlement agreement made it clear that the distributions to plaintiff constituted principal, not income.

The only remaining question is whether it would be inequitable to allow plaintiff's claim for a refund.^{6/} The Government insists that it would. It bases this argument on the fact that it is admittedly entitled to collect taxes on the income generated by the Estate from 1965-1967, and it is seemingly^{7/} time-barred from pursuing the other parties to the agreement, whereas plaintiff apparently still has all the remedies she had prior to the agreement.

This, however, should not work to plaintiff's detriment if she entered into a good faith compromise of her claimed right to an elective share. See Howard v. C.I.R., supra at 156; Grossman v. Campbell, 368 F.2d 206, 209 (5th Cir. 1966). The bona fides of the settlement cannot, however, be determined on the record before the Court. The Government has raised a question of possible collusion in view of the fact that the statute of limitations may have barred the Government's rights against the other parties to the settlement and those parties have not filed amended tax returns.

The motions for summary judgment are therefore denied pending clarification of the circumstances surrounding the execution of the compromise agreement.

SO ORDERED.

Dated: New York, New York
March 31, 1975

William C. Carner
United States District Judge

FOOTNOTES

1. This provision was superseded by Section 5-1.1 of the Estates, Powers and Trusts Law.
2. Bertha Lemle, Blanche L. Dreifus, Clarence Lemle and Leo Lemle were the named Executors of the Estate of Julius Lemle. Blanche L. Dreifus, Clarence Lemle and Leo Lemle rejected Bertha Lemle's claim to an elective share.
3. The aggregate sum would have exceeded \$1,250,000. Supplemental Petition for Compromise of Proceeding at 5.
4. Moreover, it is not necessary that the basis for the claim be conceded. Howard v. C.I.R., 447 F.2d 152, 156 (5th Cir. 1971). Nor is it significant that plaintiff relinquished so substantial a portion of her claim (see supra p.4) Lyeth v. Hoey, 305 U.S. 188, 196-97 (1938). What is crucial is what plaintiff sought to accomplish through the litigation and what the terms of the settlement encompass.
5. Although plaintiff's first communication to the Estate (see supra p.2) indicated that she sought principal or income, the gravamen of that letter was that she was not receiving her just share. All of her subsequent actions evidence an intent to treat the distributions as principal.
6. The United States Supreme Court has stated that an action for tax refund is equitable in nature. Stone v. White, 301 U.S. 532, 535 (1937).
7. This has not been conclusively established.

MEMORANDUM OPINION AND ORDER DATED FEBRUARY 3,
1976, CONNER, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

BERTHA LEMLE,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

----- X

A P P E A R A N C E S :

BLUM, HAIMOFF, GERSEN, LIPSON
& SZABAD, ESQS.
Attorneys for Plaintiff
270 Madison Avenue
New York, New York 10016

JOSEPH G. BLUM, ESQ.,
FREDERICK C. STERN, ESQ.,
Of Counsel

THOMAS J. CAHILL, ESQ.
Acting United States Attorney
U.S. Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007

WILLIAM G. BALLAINE, ESQ.,
Assistant U.S. Attorney,
Of Counsel

CONNER, D. J.:

This is an action seeking a refund of income taxes
and statutory interest thereon wrongfully assessed and collected
for tax years 1965, 1966 and 1967. An earlier Memorandum and

Agm 3/8

#43839

74 Civ. 77
(WCC)

MEMORANDUM
AND ORDER

FILED
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S.D.N.Y.

(W.C.)

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FEB 5 1976

Order, dated March 31, 1975, denying cross-motions for summary judgment, is referred to for a fuller exposition of the factual background of this case. For present purposes, the following summary will suffice.

I.

The Last Will and Testament of plaintiff's deceased husband was admitted to probate in November 1965 and provided, inter alia, that plaintiff was to receive the net income of her husband's residuary estate for the duration of her life. Payments to plaintiff, pursuant to this provision, commenced in late November 1965. The checks which represented these payments bore the inscription "income distribution." Although plaintiff retained the checks, her attorney wrote to the attorneys representing the Estate that

"no inference will be drawn from the issuance and acceptance of the check as to Mrs. Lemle's rights as a surviving spouse."

The letter further stated that the

"payment is made to her on account of the monies she will ultimately be entitled to receive out of the estate, whether by way of principal or income."

On February 3, 1966, plaintiff exercised her right, pursuant to Section 18-d of the New York Decedent Estate Law

(subsequently superseded by Section 5-1.1 of the Estates, Powers and Trusts Law), to elect to take her statutory one-third share of the Estate in lieu of her legacy under the Will. The Executors rejected plaintiff's claim on the ground that she had relinquished this right in an antenuptial agreement. Thereafter, in February 1967, plaintiff commenced an action in the Surrogate's Court to establish her right to an elective share.

Insofar as is relevant here, the payments to plaintiff under the Will continued through 1967. The Executors reported these distributions in the Estate's tax returns as distributions of income to a beneficiary and deducted the payments from its taxable income pursuant to 26 U.S.C. § 661. On the other hand, plaintiff continued to maintain that she was accepting these distributions as part of her elective share and filed income tax returns in which she treated these sums as distributions of principal excludible from gross income in accordance with 26 U.S.C. § 663.

An audit of plaintiff's tax returns for the years 1965, 1966 and 1967 resulted in an assessment of deficiencies against plaintiff for the amount of income tax that plaintiff would have paid if she had treated the amounts received from the Estate as distributions of income. The deficiencies were paid by plaintiff in August 1969. She simultaneously filed

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claims for refunds, asserting that the amounts taxed to her should properly have been taxed to others and that the sums distributed to her represented corpus.

Plaintiff's dispute with the Executors was eventually settled. The 1971 consent decree provided that plaintiff would receive \$453,712.25 (approximately one-third of what she would have received if she had prevailed at trial) in full satisfaction of her claimed right to elect against the Will. The agreement further provided that such payment consisted of principal from the Estate and that prior distributions would be considered as part payment of the total principal due her.

II.

In 1974, the parties to this action filed cross-motions for summary judgment. Plaintiff, relying upon the 1971 Surrogate's Court settlement, argued that the 1965 through 1967 distributions should be treated as principal acquired by inheritance and thus excludible from gross income pursuant to Section 102(a) of the Internal Revenue Code. 26 U.S.C. § 102(a). The Government, on the other hand, contended that the distributions were distributions of income generated by Estate property and thus includible in plaintiff's gross income pursuant to Sections 102(b) and 662 of the Internal Revenue Code. 26 U.S.C. §§ 102(b), 662. The parties both proceeded under the assumption that the crucial issue before the Court was whether the distributions represented principal or income.

If the distributions to plaintiff were principal, it was assumed they were not taxable. If the distributions were income, then, and only then, they could be taxed.

Relying primarily upon the United States Supreme Court's decision in Lyeth v. Hoey, 305 U.S. 188 (1938), which established that money received by an heir pursuant to the settlement of a will contest is to be treated as if it were acquired by inheritance, Harte v. United States, 252 F.2d 259, 261 (2d Cir. 1958), I ruled that plaintiff would be entitled to summary judgment but for the Government's claim of possible collusion in connection with the settlement. Accordingly, I denied the cross-motions for summary judgment "pending clarification of the circumstances surrounding the execution of the compromise agreement."

III.

Thereafter, the Government conceded that it had no evidence of collusion, obviating the necessity of a trial on that issue. The Government further advised the Court that a possible settlement of this matter was being considered by the appropriate Government officials in Washington. Based upon this representation, the Court, on a number of occasions, postponed any final decision to enter judgment in favor of plaintiff.

Finally, in October 1975, counsel for plaintiff submitted a proposed judgment order premised upon my March 31, 1975 Memorandum and Order and the Government's concession on the issue of collusion. In response, the Government submitted an affidavit urging the Court not to sign the proposed judgment. The Government's position, as briefly outlined in an affidavit sworn to by William G. Ballaine, Esq., the Assistant United States Attorney in charge of this case, is based upon a legal argument not previously before the Court. Mr. Ballaine's affidavit states:

"[T]he legal contention advanced here was not brought to the Court's attention earlier because it was only recognized clearly for the first time during the consideration of settlement by Department of Justice officials in Washington, D. C. "

The Government's position is based upon a review of 26 U.S.C. §§ 102, 661-63 and 26 C.F.R. §§ 1.102-1(d) and 1.662(a)-3, which Mr. Ballaine argues belie the earlier assumption that plaintiff had an absolute right to exclude distributions from her late husband's estate if the distributions she received are classified as principal or corpus. Mr. Ballaine asserts that, under circumstances set forth in Section 662(a) of the Internal Revenue Code, principal distributions received from an estate may still be includible as gross income within the meaning of Section 102(b).

Section 662(a)(1) provides that whenever the sum of all income "required to be distributed currently" by an estate to all beneficiaries exceeds the estate's "distributable net income" then

"there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (as so computed) as the amount of income required to be distributed currently to such beneficiary bears to the amount required to be distributed currently to all beneficiaries. For purposes of this section, the phrase 'the amount of income for the taxable year required to be distributed currently' includes any amount required to be paid out of income or corpus to the extent such amount is paid out of income for such taxable year." (Emphasis supplied.)

Moreover, Section 662(a)(2) provides that the gross income of a beneficiary shall also include

"[a]ll other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year. If the sum of --

(A) the amount of income for the taxable year required to be distributed currently to all beneficiaries, and

(B) all other amounts properly paid, credited, or required to be distributed to all beneficiaries exceeds the distributable net income of the estate or trust, then * * * there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (reduced by the amounts specified in (A)) as the other amounts properly paid, credited or required to be distributed to the beneficiary bear to the other amounts properly paid, credited, or required to be distributed to all beneficiaries." (Emphasis supplied.)

Based upon these two subdivisions of Section 662 and the regulations promulgated thereunder, the Government concludes that, even if the distributions to plaintiff are treated as principal, rather than as income distributions, plaintiff cannot avoid some inclusion of the distributions in her gross income for each of the years 1965, 1966 and 1967 unless she can demonstrate that the

"income required to be distributed 'currently' during each of those three years by the estate equalled or exceeded the Estate's 'distributable net income' in each year."

IV.

It would be premature for the Court to rule upon the Government's argument, based, as it is, upon a rather sketchy and as yet unanswered affidavit. The affidavit does however raise a potentially critical legal impediment to plaintiffs' case which, to this point, has neither been briefed by the parties nor considered by the Court. I do not agree with plaintiffs' counsel that this issue should be rejected as "just another in a long series of pointless delaying tactics * * * in this case." Although it is indeed unfortunate that this new argument was not raised much earlier, I accept Mr. Ballaine's representation that the failure to do so was the result of good faith oversight.

Under the circumstances, it would be inappropriate and unjust to enter judgment in this case until the Government's argument can be considered in more detail. Accordingly, the Government will have twenty (20) days from the date of this order to submit a memorandum of law fleshing out the legal theory skeletonized in Mr. Ballaine's affidavit with whatever citations of supporting authority it deems instructive. Plaintiff will have fifteen (15) days thereafter to respond.

SO ORDERED.

William C. Connel
United States District Judge

Dated: New York, New York

February 3, 1976

A-131
EXHIBIT A TO PLAINTIFF'S MEMORANDUM IN
SUPPORT - PARAGRAPH EIGHTEEN OF THE LAST
WILL AND TESTAMENT OF JULIUS LEMLE

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LAST WILL AND TESTAMENT OF
JULIUS LEMLE

after September 1, 1958, I give, bequeath and devise all the rest, residue and remainder of my estate to my trustees hereinafter named, to be held by them in trust nevertheless, for the following uses and purposes:

1. To invest and reinvest and keep the same invested with power to call in and change the investment thereof from time to time and to collect and receive the income thereof and after paying therefrom all lawful charges and expenses, to pay over in monthly installments to my said wife BERTHA LEMLE, my daughter, BLANCHE, and my daughter JEANNETTE, the net income thereof in equal proportions during their lifetime.

2. Upon the death of any of the aforementioned persons, I direct that the trust herein created be continued and the net income thereof be paid over to the survivor or survivors of them until the last of the persons herein named as life beneficiaries of the trust shall have died, at which time I direct that my trustees pay over the principal or corpus of said trust together with any accumulated income thereon still in their hands

EXHIBIT A

LAST WILL AND TESTAMENT OF
JULIUS LEMLE

to the children of my sons CLARENCE LEMLE and LEO LEMLE in equal shares. If any of the children of my said sons CLARENCE LEMLE and LEO LEMLE shall have died leaving issue or descendants of issue at the termination of said trust, such issue or descendants shall receive the share which the parent would have received per stirpes and not per capita.

3. I authorize and empower my trustees at any time during the lifetimes of my said wife BERTHA LEMLE and my daughters, BLANCHE and JEANNETTE, to pay to them or either of them or apply for their benefit so much of the net income or so much of the principal of said trust as my trustees in their absolute discretion may deem advisable for any expense incurred by any of the aforementioned life beneficiaries on account of serious accident or illness or in the event of any other serious emergency necessitating the payment of medical, hospital or nursing bills, if in the opinion of my trustees the income of such beneficiary is insufficient to defray such charges.

EXHIBIT B TO PLAINTIFF'S MEMORANDUM IN
SUPPORT - FIRST PAGE OF MRS. LEMLE'S
1973 INCOME TAX RETURN WITH THE SCHEDULE
OF INTEREST INCOME
4429-10 296

Form 1040

US Department of the Treasury—Internal Revenue Service
Individual Income Tax Return

1973

For the year January 1–December 31, 1973, or other taxable year beginning 1973, ending 19

Name (If joint return, give first names and initials of both) **BERTHA K** Last name **LEMLE** COUNTY OF RESIDENCE **NEW YORK** Your social security number **052 40 3108**

Present home address **170 ALUM, HAINOFF, GERSEN, LIPSCHITZ ROAD, 270 MAD** Spouse's social security no.

City, town or post office, State and ZIP code **NEW YORK NY 10016** Occupation **Yours** Spouse's

Filing Status—check only one:

- 1 ☒ Single
- 2 ☐ Married filing joint return (even if only one had income)
- 3 ☐ Married filing separately. If spouse is also filing give spouse's social security number in designated space above and enter full name here.

- 4 ☐ Unmarried Head of Household
- 5 ☐ Widow(er) with dependent child (Year spouse died $\blacktriangleright$ 19)

Exemptions

- 6a Yourself ☒ Regular ☒ 65 or over ☐ Blind ☐ Enter number of boxes checked **2**
- b Spouse ☐ ☐ ☐
- c First names of your dependent children who lived with you

- d Number of other dependents (from line 27) **2**
- 7 Total exemptions claimed **2**

- 8 Presidential Election Campaign Fund.—Check ☐ if you wish to designate \$1 of your taxes for this fund. If joint return, check ☐ if spouse wishes to designate \$1. Note: This will not increase your tax or reduce your refund. See note below.

Income	9	Wages, salaries, tips, and other employee compensation.	
	10a	Dividends (See instructions on page 6.) \$ 500	10b Less exclusion \$ 100 Balance 522
	10d	(Gross amount received, if different from line 10a)	
	11	Interest income	39,493
	12	Income other than wages, dividends, and interest (from line 38)	11
	13	Total (add lines 9, 10c, 11, and 12)	40,404
	14	Adjustments to income (such as "sick pay," moving expenses, etc. from line 43)	
	15	Subtract line 14 from line 13 (adjusted gross income)	40,404

- If you do not itemize deductions and line 15 is under \$10,000, find tax in Tables and enter on line 16.
- If you itemize deductions or line 15 is \$10,000 or more, go to line 44 to figure tax.
- CAUTION: If you have unearned income and can be claimed as a dependent on your parent's return, check here ☐ and see instructions on page 7.

Tax, Payments and Credits	16	Tax, check if from:	☐ Tax Tables 1–12	☒ Tax Rate Schedule X, Y, or Z	16	2,234
		☐ Schedule D	☐ Schedule G	☐ Form 4726 OR ☐ Form 4972	17	
	17	Total credits (from line 54)			18	2,234
	18	Income tax (subtract line 17 from line 16)			19	
	19	Other taxes (from line 61)			20	2,234
	21a	Total Federal income tax withheld (attach Forms W-2 or W-2P to front)				
	b	1973 estimated tax payments (include amount allowed as credit from 1972 return)		2,000		
	c	Amount paid with Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return				
	d	Other payments (from line 65)				
	22	Total (add lines 21a, b, c, and d)			2,000	
Balance Due or Refund	23	If line 20 is larger than line 22, enter BALANCE DUE IRS (Check here ☐ if Form 2210, Form 2210F, or statement is attached. See instructions on page 8.)			234	
	24	If line 22 is larger than line 20, enter amount OVERPAID				
	25	Amount of line 24 to be REFUNDED TO YOU				
	26	Amount of line 24 to be credited on 1974 estimated tax				

Note: 1972 Presidential Election Campaign Fund Designation.—Check ☐ if you did not designate \$1 of your taxes on your 1972 return, but now wish to do so. If joint return, check ☐ if spouse did not designate on 1972 return but now wishes to do so.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which he has any knowledge.

Sign here

your signature

Date

Preparer's signature (other than taxpayer)

Date

052-40-3108

LEMLE

4429-10

286

1973 FEDERAL INCOME TAX STATEMENTS

PAGE 2

STATEMENT 2 - DIVIDEND INCOME

	QLFYING	NON QLFYING	CAPITAL GAIN	NON TAXABLE
PACIFIC PETROLEUM LTD	18			
UNITED CORP	28	23	22	
ALLIED MILLS	62			
AQUITAINE CO OF CANADA	17			
STANDARD ALLIANCE INDUST	113			
UNITED BRANDS	22			
BATH INDUSTRIES	144			
SUN CHEMICAL	8			
AMERADA HESS	41			
BELDING HEMINWAY CO	24			
TOTALS	477**	23**	22**	0**

STATEMENT 3 - INTEREST INCOME

	AMOUNT
MANHATTAN SAVINGS BANK	2,423
THE BOWERY SAVINGS BANK	2,380
UNION DIME SAVINGS BANK	1,849
SEAMANS BANK FOR SAVINGS	1,532
HOLLYWOOD FED S&L	159
EMIGRANT SAVINGS	1,545
FNCB	1,724
ESTATE OF JULIUS LEMLE	24,645
MORTGAGE HOLDING-450 E 81ST ST	1,225
MORTGAGE HOLDING-315 E 84TH ST	1,224
MORTGAGE HOLDING-326 E 65TH ST	1,287
TOTAL INTEREST INCOME	39,993**

MEMORANDUM OPINION AND ORDER DATED SEPTEMBER 2,
1976, CONNER, J.

ORIGINAL ✓

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

BERTHA LEMLE,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES:

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WILLIAM G. LAMARCA, ESQ.,
Assistant United States Attorney,
Of Counsel

CONNER, D. J.:

The above-captioned action for refund of federal

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income taxes, brought pursuant to 26 U.S.C. § 7422, has been the subject of two prior Memoranda and Orders of this Court, the first dated March 31, 1975, the second dated February 3, 1976. In its first decision, the Court denied the parties' cross-motions for summary judgment; in its second decision, the Court once again denied an application by plaintiff for entry of judgment in her favor, pending the parties' submissions with respect to a potentially critical question of law that had been newly raised by defendant. This most recent chapter in an unhappily protracted litigation follows the Court's review of those submissions.

A full exposition of the events at the base of plaintiff's summary judgment motion appears in the March 31, 1975 Memorandum and need not be recited anew. The factual setting of this case will be retraced only to the extent necessary to the discussion of legal issues that follows.

I.

From the latter part of 1965 through 1967, plaintiff received a series of payments pursuant to her late husband's Last Will and Testament, which bequeathed to her, inter alia, a life interest in a portion of the net income generated by the residue of Mr. Lemle's estate. The checks representing those payments had been uniformly legended by the executors as "income distribution[s]," a characterization vigorously protested

by plaintiff's attorney. Indeed, at the outset, the latter had advised the estate's representatives that his client's retention of the checks was, at least in his own view, without prejudice "to Mrs. Lemle's rights as a surviving spouse" and that those checks constituted

"payment * * * on account of the monies [Mrs. Lemle] will ultimately be entitled to receive out of the estate, whether by way of principal or income."

In February 1966, plaintiff filed a notice of election against the will, under then-effective Section 18-d of the New York Decedent Estate Law.^{1/} Maintaining that the terms of an antenuptial agreement disabled plaintiff from exercising her elective right, the executors refused to recognize plaintiff's statutory claim. Thus, the estate's federal tax returns reported the 1965, 1966, and 1967 payments to plaintiff as distributions from income to a will beneficiary, i.e., distributions deductible from the estate's taxable income under 26 U.S.C. § 661.^{2/} Plaintiff, for her part, treated the payments received by her during those years as distributions drawn from estate principal and thus excludible from gross income under 26 U.S.C. § 102(a).^{3/}

The contest between plaintiff and the executors, culminating in a New York County Surrogate's Court proceeding, was ultimately resolved by the issuance of a consent decree in April 1971. The latter acknowledged plaintiff's right to a surviving

spouse's elective share and provided for an adjustment of plaintiff's consequent claim against Mr. Lemle's estate. As this Court earlier noted, the 1971 settlement -- referenced in the Surrogate's confirming decree -- determined that payments to plaintiff, in satisfaction of her elective share, were to "consist[] of principal from the Estate" and further provided that "prior distributions would be considered as part payment of the total principal due" plaintiff. Lemle v. United States, Docket No. 74 Civ. 77 at 4 (S.D.N.Y. March 31, 1975).

Prior to consummation of the above-outlined compromise agreement, the Internal Revenue Service had assessed deficiencies with respect to plaintiff's income tax returns for the years 1965, 1966, and 1967, those assessments representing the difference between Mrs. Lemle's tax liabilities as reported and her tax liabilities computed on the premise that her receipts from the executors had constituted income distributions. Plaintiff paid the Internal Revenue Service the amounts assessed and, at the same time, filed claims for refunds of those amounts. The refund claims, as well as the present action which followed their disallowance by the Service, were bottomed upon Mrs. Lemle's contention that the 1965, 1966, and 1967 payments had been distributed from estate corpus and thus were not properly included in her gross income.

II.

In its decision of March 31, 1975, this Court concluded -- for reasons discussed at length in the Memorandum -- that the monies presently at issue had "constituted principal, not income," 74 Civ. 77 at 10, their character thus settled by the 1971 decree's vindication of plaintiff's claim as a surviving spouse. Plaintiff's motion was nonetheless denied in the light of defendant's contention that the 1971 settlement had been the product of collusion, a contention that raised material questions of fact foreclosing the entry of summary judgment. The Government thereafter conceded that it could supply no proof to support its allegation of collusion. Nevertheless, defendant urged the Court not to sign the proposed judgment order submitted by plaintiff in response to the Government's concession. In so doing, the Government has invited this Court to traverse a legal ground apparently discovered by defendant only after the Court's disposition of the parties' original cross-motions.

III.

The Government's present position is founded upon the operation of Sections 102 and 662 of the Internal Revenue Code. According to the Government a review of those sections and the regulations thereunder belies what earlier had been

assumed by both the parties and the Court --i.e., that plaintiff would have been entitled to exclude from her gross income all distributions from Mr. Lemle's estate if those distributions had been from corpus. Thus, defendant argues, principal distributions from an estate may be includible in gross income, within the meaning of Section 102(b) of the Internal Revenue Code, under circumstances described in Section 662(a).

Section 102(b)(2) prescribes that, "where [a] gift, bequest, devise, or inheritance is of income from property, the amount of such income" may not be excluded from gross income. The section further provides that "[a]ny amount included in the gross income of a beneficiary under subchapter J shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property."

Section 662(a), a provision within Code subchapter J, Chapter 1, in pertinent part directs that the gross income of a beneficiary -- i.e., an heir, legatee, or devisee (26 U.S.C. § 643)^{4/} -- shall include the sum of

"(1) * * * * [t]he amount of income for the taxable year required to be distributed currently [by an estate or trust described in Section 661] to such beneficiary, whether distributed or not. * * * *

"(2) * * * * [a]ll other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year. If the sum of --

(A) the amount of income for the taxable year required to be distributed currently to all beneficiaries, and

(B) all other amounts properly paid, credited, or required to be distributed to all beneficiaries

exceeds the distributable net income of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (reduced by the amounts specified in (A)) as the other amounts properly paid, credited or required to be distributed to the beneficiary bear to the other amounts properly paid, credited, or required to be distributed to all beneficiaries."

From the above provisions the Government concludes that, notwithstanding this Court's earlier determination that the amounts at issue must be treated as distributions of principal, plaintiff cannot counter the inclusion in her 1965-67 gross income of at least some portion of those distributions unless she can demonstrate that the

"amount of income of the estate which was 'required to be distributed currently' to beneficiaries in those years -- i.e. first tier amounts -- equalled or exceeded the estate's distributable net income in each year." Defendant's Memorandum at 9.

IV.

An estate beneficiary may well regard Section 662 as the engine of an unhappy metamorphosis. Thus, as the Government

has indirectly noted, a distribution that has in truth been drawn from estate corpus may -- by force of Section 662 provisions and for purposes of the gross income calculus -- be converted into includible income if the "income required to be distributed currently" by the estate does not at least equal the estate's "distributable net income" for the taxable year.

The design of Section 662 is clear enough: the section as presently framed effectively eliminates the problem of tracing distributions to their source, a problem that had inevitably attended the former statutory schema. See 1954 U.S. Code Cong. & Admin. News at 4086-87, 4621, 4714-15, 4990 (83d Cong., 2d Sess.). It is equally clear that distributions representing an elective share in the corpus of a deceased spouse's estate may be subject to the conclusive presumption raised by Section 662. See 26 U.S.C. § 663 and 26 C.F.R. § 1.663(a)-1(b).^{5/}

Plaintiff argues, however, that the amounts now under contest are not addressed by Section 662 because those amounts were not "properly paid." Plaintiff would rest that contention upon the 1971 decree's confirmation of her right to an elective share. That undisputed fact, plaintiff maintains, consequently establishes that the 1965-67 checks -- identified by the executors as distributions from income and issued in accordance with Mr. Lemle's will -- were necessarily improper payments.

After all, plaintiff notes, "by the very act of filing her intention to take her elective share, [Mrs. Lemle had] effectively terminated and waived any right she might have [had] to distributions of income pursuant to * * * her late husband's will." Plaintiff's Memorandum at 6. Thus, plaintiff reasons,

"During the entire period in question, the plaintiff's rights in the estate were undetermined and her ultimate right to the distributions of income was contingent on a rejection of her claim of election. As a matter of law, if her right of election were sustained, she would be obligated to return to the estate the money paid as distributions of income. In re Lieberman's Will, 206 Misc. 263, 132 N.Y.S.2d 558(1954)." Id. at 10.

Plaintiff's argument need not detain us long. It is enough to note that plaintiff's entitlement to payments from the executors during 1965-67 -- whether those payments consisted of income distributions under Mr. Lemle's will or distributions of principal under Section 18-d -- was at no time the subject of dispute; rather, the disagreement between Mrs. Lemle and the estate representatives reflected solely on the character of the 1965-67 receipts.

The 1971 Surrogate's Court decree hardly established that the executors had improperly distributed income to plaintiff. Indeed, in her previous submissions to this Court, plaintiff herself had underscored what she apparently at this

juncture has chosen to forget: as the Court has already observed, the 1971 decree determined, nunc pro tunc, that the 1965-67 payments had represented principal distributions toward satisfaction of plaintiff's elective share.

But even more to the present point, the character of the 1965-67 payments, however ultimately determined, would not in any event have affected the propriety of such payments during the subject period. To be sure, plaintiff's status either as a testamentary beneficiary or as a statutory heir remained unsettled during that period. Plaintiff was at the time, nonetheless and beyond question, either the one or the other -- and was therefore properly the recipient of payments by the executors. Plaintiff has in no way suggested otherwise, i.e., that either by the provisions of Mr. Lemle's will or by the terms of Section 18 of the Decedent Estate Law, cf. New York Estates, Powers and Trusts Law § 11-1.5, the executors had been bound to withhold such amounts from plaintiff during the years in question.

Nor does plaintiff's citation of In re Lieberman's Will, supra, avail her here. The ruling in that case no more than echoes the established principle that one who "'rescinds [a] contract * * * must do so in toto and return the consideration received on the contract sought to be rescinded'." 132 N.Y.S. 2d at 559. The Lieberman decision thus, for present purposes, supplies no relevant instruction.

V.

Notwithstanding the above, plaintiff would have this Court conclude that by independent operation of New York law and the 1971 decree "there was no * * * undistributed distributable net income for the years in question," Plaintiff's Memorandum at 19, that would allow the Government's resort under Section 662 to the second-tier amounts paid plaintiff. The substance of plaintiff's two-fold argument is as follows:

1) Plaintiff's ultimately successful exercise of her elective right resulted in an automatic acceleration of the testamentary trust that plaintiff had thereby renounced. In consequence, plaintiff reasons, other residuary beneficiaries automatically succeeded, by the terms of Mr. Lemle's will and under relevant New York case law, to Mrs. Lemle's trust income interest and, again in accordance with the will provisions,^{6/} thereby absorbed the entirety of the testamentary trust's net income for the years 1965, 1966, and 1967.

2) The 1971 decree incorporated by reference a Supplemental Petition to the effect, inter alia, that Mr. Lemle's daughters were to absorb any increased tax liabilities that otherwise would be borne by plaintiff as a result of the settlement

to which plaintiff, the estate representatives, and the Lemle daughters were parties. The Government's recourse, plaintiff argues, was thereby limited solely to assessments against persons other than plaintiff.

Each of the above-recited arguments gives little reason for pause. Two observations suffice to dispatch the latter of those arguments. First, the Surrogate's Court decree did not, as plaintiff would have it, incorporate the Supplemental Petition upon which plaintiff relies; ^{7/} in any event, those portions of the parties' agreement that were so incorporated and that bear arguable relevance in this respect appear to have expressed no more than an estimate, by the parties' attorneys, of the tax implications flowing from the parties' settlement. Moreover, plaintiff has -- understandably -- cited no authority for the proposition that a person may by private agreement so effectively shift his tax liability to another that the Government will be bound thereby. Indeed, were the law so framed, the statute of limitations on Internal Revenue Service assessments would become a matter most cherished by reticent friends.

This of course by means suggests that Mrs. Lemle and other parties to the 1971 settlement may not have entered into a contract of indemnity that is wholly binding inter sese. But, if such be the case, in the face of the present litigation,

it is plaintiff's recourse -- rather than the Government's -- that has thereby been defined.

Plaintiff's remaining contention is quite clearly damned by its own terms. This Court has already ruled that plaintiff received the amounts at issue as a beneficiary of Mr. Lemle's estate. Although, as defendant has suggested, this Court's present inquiry under Section 662 must therefore be addressed to "the distributions required to be made currently by the estate, other amounts properly paid by the estate, and distributable net income of the estate in 1965, 1966 and 1967," Defendant's Memorandum at 10-a, it is the testamentary trust upon which plaintiff's final argument centers. Plaintiff's focus is thus wholly misdirected, for

"[a] trust, though created by the same will under which an estate is being administered, is a distinct tax entity as soon as it comes into being and has income attributable to it, even though the same individual is executor of the estate and trustee of the trust."
6 Mertens, Law of Federal Income Taxation
§ 36.44, at 114 (1976).8/

We are left, therefore, without relevant evidence by which to gauge plaintiff's present claim against the provisions of Section 662. As to plaintiff's charge that the Government will "at some future date * * * come in with [the] concession that it has no evidence on the point," Plaintiff's Memorandum at 4, this Court need only observe that "[i]n a refund suit the taxpayer bears the burden of proving the amount he is entitled

to recover." United States v. Janis, 44 U.S.L.W. 5303, 5305
(U.S. July 6, 1976).

For the reasons discussed above, plaintiff's motion
for summary judgment must again be denied.

SO ORDERED.

William C. Conner
United States District Judge

Dated: New York, New York
September 2, 1976

FOOTNOTES

1. Section 18 of the Decedent Estate Law has since been superseded by Section 5-1.1 of the New York Estates, Powers and Trusts Law.
2. Section 661 provides in pertinent part as follows:

(a) Deduction. -- In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate or trust (other than a trust to which subpart B applies), the sum of --

 - (1) any amount of income for such taxable year required to be distributed currently (including any amount required to be distributed which may be paid out of income or corpus to the extent such amount is paid out of income for such taxable year); and
 - (2) any other amounts properly paid or credited or required to be distributed for such taxable year;

but such deduction shall not exceed the distributable net income of the estate or trust.
3. Section 102(a) provides that, "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."
4. The Section 643 definition of the term "beneficiary" apparently is not intended to be exclusive. That is, the term "beneficiary" within the meaning of Section 662 clearly comprehends additionally the beneficiary of an inter vivos trust.
5. A dower interest, in contradistinction to a surviving spouse's elective share, is excepted from Section 662 coverage. The rationale behind this difference in tax treatment is indirectly revealed in 26 C.F.R. § 1.663(a)-1(b).

6. The assertedly pertinent portion of Mr. Lemle's will reads as follows:

"1. [The trustees are authorized to] invest and reinvest and keep the same invested; to collect and receive the income thereof and after paying therefrom all legal charges and expenses, to pay over in monthly installments the net income of each trust herein created to my wife BERTHA, my daughter BLANCHE, and my daughter JEANETTE, for so long as each shall live.

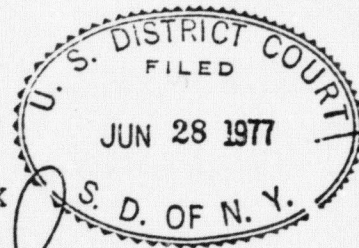
"2. Upon the death of any of the persons who are the beneficiaries of said individual and separate trust, I direct that the trust for each deceased beneficiary be continued and that the income thereof be paid to the survivors * * * ."

7. The Surrogate's Court decree "approved, authorized and ratified" only the three "compromise agreements" that were annexed to the Supplemental Petition, rather than the latter itself. See Index G, attached to plaintiff's original motion papers, at 3.
8. The Court need not presently determine whether the testamentary trust was in esse at the time the amounts in issue were paid to plaintiff, nor need it now consider the possible tax implications of such determination. See 6 Mertens, supra, at § 36.44 n.4; whether or not the trust established by Mr. Lemle's will had, in fact and in law, an independent existence for federal tax purposes might affect the ultimate computation of Mrs. Lemle's tax liabilities during the years in question, but would not conclude the refund question presently before the Court.

MEMORANDUM OPINION AND ORDER DATED JUNE 28,
1977, CONNER, J.

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
BERTHA LEMLE,

Plaintiff, : 74 Civ. 77
(WCC)

- against - :

UNITED STATES OF AMERICA, : MEMORANDUM
AND ORDER
Defendant. :

----- X

A P P E A R A N C E S :

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& SZABAD, ESQS.
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Assistant United States Attorney
Of Counsel

CONNER, D. J.:

The above-captioned action for a refund of federal income taxes, brought pursuant to 26 U.S.C. § 7422, was commenced on January 3, 1974. Since that date, no fewer than three Memoranda and Orders have previously issued from

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JUN 28 1977

this Court in response to motions by plaintiff for summary judgment. The parties are once again before the Court on plaintiff's renewed application for judgment -- demonstrating, at least, that the age of an action cannot wither, nor the custom of litigative disappointments stale, plaintiff's infinite variety as a movant.

Having in each earlier Memorandum traced in exhaustive, if not exhausting, detail the network of facts that underlies the present parties' contest, this Court declines on this fourth occasion to do so once more. Nor will we now track anew the somewhat uneven analytic course described by the parties' earlier submissions. Such history as is necessary to give contexture to the discussion that follows is adequately chronicled in our Memorandum and Order of September 2, 1976, at 419 F. Supp. 68. For present purpose, we need only note that plaintiff's present submission has been prompted by this Court's most recent ruling, i.e., that distributions of principal received by plaintiff from her late husband's estate, under a consent decree settling her claim to a surviving spouse's elective share, were includible in plaintiff's gross income to the extent required by the tandem operation of 26 U.S.C. §§ 102 and 662.

I.

Plaintiff has launched her assault upon that ruling with no less a weapon than the Constitution itself. Observing that the Sixteenth Amendment, in terms, empowers the Congress to levy direct taxes on income only, plaintiff argues that Sections 102 and 662 thus cannot be so applied as to permit the Government to lay claim to taxes on principal distributions such as those that figure in the present case. An argument so framed invites a ready response: the subject of the tax arising from the cited statutory provisions is, of course, not principal, as plaintiff would have it, but rather, the distributable net income generated by an estate during the taxable year. To be sure, a beneficiary who has received solely principal from an estate may be liable, by operation of Sections 102(b)(2) and 662(a), for at least a portion of the tax on that estate's distributable net income. United States v. Bank of America National Trust & Savings Association, 326 F.2d 51, 54 (9th Cir. 1963); Casco Bank & Trust Company v. United States, 406 F. Supp. 247, 250-51 (S.D.Me. 1975); Bohan v. United States, 326 F. Supp. 1356, 1357-59 (W.D. Mo. 1971), aff'd, 456 F.2d 851 (8th Cir. 1972). Why such burden is imposed and when it must be borne are matters that have already been discussed in our September 2, 1976 Memorandum and need not, for present purposes, be repeated.

As a second line of attack, plaintiff reminds us of Section 102(a)'s "General Rule," i.e., that "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance," and proceeds to an argument that is best described -- and exposed -- by reproduction:

"[T]he legislative objective sought to be accomplished by Sections 661-663 [does not] suggest any purpose to modify Section 102(a) or (b) -- if this were contemplated, there would have been included in Section 102(a) qualifying phrases such as 'except as otherwise provided in Section 662'; or 'subject to Section 662 * * *'.* * *. Surely, if, as the government argues, 'a distribution of principal may be deemed an income distribution for tax purposes' under Sections 661 and 662, there would have been a 'cross reference' or an 'exception' in Section 102(a)." Plaintiff's Main Brief at 4.

Unhappily, the above-quoted reasoning stands upon -- and must fall with -- a patently studied disregard of the last sentence of Section 102(b), particularly its reference to "subchapter J," which includes Section 662.

As a final -- albeit most vigorous -- thrust, plaintiff argues that the distributions at issue are in any event excepted from the operation of Section 662 by force of Section 663, which provides, in allegedly pertinent part, as follows:

"There shall not be included as amounts falling within section * * * 662(a) --
* * * Any amount which, under the terms of the governing instrument, is properly

paid or credited as a gift or bequest of a specific sum of money or of specific property and which is paid or credited all at once or in not more than 3 installments." 26 U.S.C. § 663(a)(1).

We need not pause to describe the pains taken by plaintiff in her understandably awkward effort to fit the payments received by her pursuant to the 1971 settlement within the bounds of Section 663(a). In this respect, we linger only long enough to note in wonderment that plaintiff herself supplies the proper -- and, for her cause, damning -- measure of this last argument by recalling our attention to Federal Income Tax Regulation 1.663(a)-1, which, in relevant part, explains:

"In order to qualify as a gift or bequest of a specific sum of money or of specific property under section 663(a), the amount of money or of specific property must be ascertainable under the terms of a testator's will as of the date of his death * * * ." 26 C.F.R. § 1.663(a)-1(b)(1).

It is enough to note that the distributions now in question were, as the above-mentioned consent decree established, payments toward satisfaction of the settlement of plaintiff's claim to an elective share, that settlement effected years subsequent to the death of plaintiff's husband. Moreover, such a settlement could not even arguably be deemed to have related back to the date of Mr. Lemle's death unless it were treated as the equivalent of the elective claim upon which it was based;

such treatment, however, could supply no added grace to plaintiff's current posture: an elective share is not excluded from the operation of Section 662. See Lemle v. United States, 419 F. Supp. at 71 & n.5.

II.

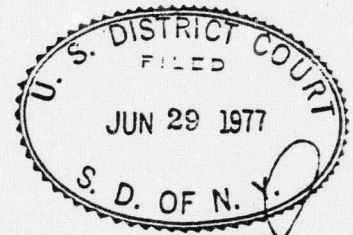
As the above discussion indicates, this Court's earlier ruling is unshaken by the force of plaintiff's latest contentions. With so much concluded, we are left, as before, "without relevant evidence by which to gauge plaintiff's present claim against the provisions of Section 662." Lemle v. United States, 419 F. Supp. at 74. And, as was also observed in our September 2, 1976 Memorandum, the burden rests with plaintiff to "prov[e] the amount [s]he is entitled to recover." Id., quoting United States v. Janis, 96 S. Ct. 3021, 3025 (1976). Nonetheless, plaintiff has advised the Court that she rests her case with this most recent submission. Accordingly, in the absence of an evidentiary undertaking by plaintiff, this Court is obliged to direct that judgment be entered dismissing the complaint upon which this action rests.

SO ORDERED.

William E. Conner
United States District Judge

Dated: New York, New York

June 28th, 1977



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
BERTHA LEMLE

Plaintiff

: 74 Civil 77 (WCC)

-against-

UNITED STATES OF AMERICA

Defendant
----- X

:

:

:

JUDGMENT

Plaintiff having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable William C. Conner, United States District Judge, and the Court thereafter on June 28, 1977, having handed down its memorandum decision, it is,

ORDERED, ADJUDGED and DECREED: That accordingly, in the absence of an evidentiary undertaking by plaintiff, this Court is obliged to direct that judgment be entered dismissing the complaint upon which this action rests., the complaint is dismissed in its entirety.

Dated: New York, N.Y.
June 29, 1977

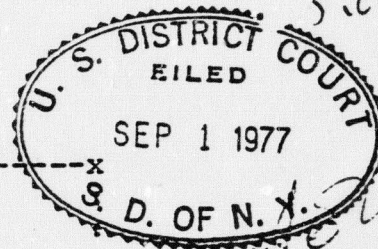
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JUN 29 1977

Raymond F. Beaghtol
Clerk

A-158
NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



BERTHA LEMLE,

Plaintiff,

74 Civ. 77
(WCC)

-against-

UNITED STATES OF AMERICA,

NOTICE OF APPEAL

Defendant.
-----X

NOTICE is hereby given that Bertha Lemle, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment dismissing plaintiff's complaint, entered in this action on the 29th day of June, 1977.

Dated: New York, New York

September 1, 1977

BLUM HAIMOFF GERSEN LIPSON & SZABAD

By:

Samuel J. Kehlman
Partner

Attorneys for Plaintiff
270 Madison Avenue
New York, N.Y. 10016
(212) 683-6383

*Received
C.D. x
40 Day
Notice
9/1/77
BZ*

*U.S. District
at Southern District of N.Y.
150 Nassau Street
N.Y. 10038*

ORDER OF CONNER, J., TO EXTEND PLAINTIFF'S
TIME TO FILE NOTICE OF APPEAL DATED 9/19/77

Done
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

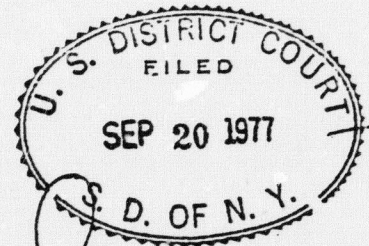
-----X
BERTHA LEMLE,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
-----X



74 Civ. 77
(WCC)

ORDER

Plaintiff, having moved this Court for an Order pursuant to Rule 4(a) of the Federal Rules of the Appellate Procedure extending her time for her to file a Notice of Appeal for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed, on the grounds of excusable neglect, and plaintiff having appeared in support of said motion by her attorneys, Messrs. Blum, Haimoff, Gersen, Lipson & Szabad, Seymour J. Kehlmann, Esq., of counsel, and defendant having appeared by its counsel, Robert B. Fiske, Jr., United States Attorney, William G. Ballaine, Esq., Assistant United States Attorney, of counsel, and defendant not having opposed the granting of the relief requested;

NOW, on motion of Messrs. Blum, Haimoff, Gersen, Lipson & Szabad, attorneys for plaintiff, it is

MICROFILM

SEP 20 1977

ORDERED, that Plaintiff's time to file her Notice of Appeal from the Judgment of this Court dismissing her complaint filed herein on June 29, 1977, be and the same hereby is extended for a period of ten (10) days from the expiration of the time otherwise prescribed.

Dated:

New York, New York
September 19, 1977

William C. Conner

United States District Judge

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

DANILO A HENRY, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 661 GREEVE AVE.
BROOKLYN, N.Y.

That on the 1 day of NOVEMBER, 19 77,
deponent personally served the within JOINT APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose

By leaving 1 true ~~copies~~ of same with a duly
authorized person at their designated office.

~~By depositing~~ true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

PAUL J. CURRAN
United States Attorney for the Southern
District of New York
Attorney for Defendant-Appellee
United States Courthouse
Foley Square
New York, New York 10007
(212) 264-6397

Sworn to before me this

1 day of November, 19 77

Daniilo A. Henry
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979